No. 12222.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOEW'S INCORPORATED, a corporation,

Appellant,

vs.

LESTER COLE,

Appellee.

APPELLANT'S OPENING BRIEF.

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IN THE

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FOR THE NINTH CIRCUIT

LOEW'S INCORPORATED, a corporation,

Appellant,

vs.

LESTER COLE,

Appellee.

APPELLANT'S OPENING BRIEF.

INTRODUCTORY STATEMENT.

This is an appeal by Loew's Incorporated, a producer of motion pictures and the defendant below, from a declaratory judgment entered after a special jury verdict.[1]

The controversy in connection with which the rights and obligations of the parties were declared may be briefly stated as follows:

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[1]The parties will be referred to in this brief by their designations in the trial court.

Plaintiff was employed by defendant under a written contract as a writer of screenplays or scenarios. The contract provided, among other things, that plaintiff would not do anything that would tend to bring him into public scorn or contempt or shock or offend the community or that would prejudice his employer or the motion picture industry generally.

Between October 20th and October 30, 1947, the Committte On Un-American Activities of the House of Representatives conducted a public hearing as part of its inquiry regarding alleged Communist infiltration of the motion picture industry. Plaintiff was called as a witness and, in response to questioning by the Committee, refused to disclose whether he was or had been a member of the Communist Party. For such refusal he was cited and indicted for contempt of the Congress of the United States. The Committee hearing and the conduct of plaintiff as a part thereof received intensive nation-wide publicity by radio, editorial comment, news reels and all of the other media of news distribution. It was and is the contention of defendant that the conduct of plaintiff at and in connection with said hearing created throughout the country a widespread belief that plaintiff was a Communist and that he held in contempt the Congress of the United States and the fundamental institutions of this country. It was and is the contention of defendant that the conduct of plaintiff created throughout the country a widespread belief that the defendant and the motion picture industry

generally employed and harbored Communists and had a sympathetic and indulgent attitude towards Communism. It was and is the contention of defendant that such conduct of plaintiff brought or tended to bring plaintiff into public scorn and contempt, tended to shock and offend the community and prejudiced the interests of the defendant, his employer, and the motion picture industry generally. It was and is the contention of defendant that plaintiff by such conduct violated his contractual obligations and therefore was not entitled to enforce the employment contract against defendant.

The verdict of the jury and the consequent judgment of the trial court was to the effect that plaintiff had not violated those provisions of the employment contract to which particular attention has been directed and that plaintiff was entitled to enforce the contract against defendant. It is the contention of defendant that a fair trial and a proper determination of the factual issues was not had, because of erroneous rulings of the trial court on the admission and exclusion of evidence, because of errors in the trial court's charge to the jury, and because of the refusal of the District Judge to disqualify himself on the ground of personal bias and prejudice against the defendant.

STATEMENT OF JURISDICTION.

1. The statutory provisions believed to sustain the jurisdiction of the District Court are U. S. Code, Title 28, Sec. 1332 [formerly the Act of Mar. 3, 1875, Chap. 137, Sec. 1, 18 Stat. 470, as amended; 28 U. S. C. A., Sec. 41(1)] providing that the "district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3000 . . . and is between: (1) Citizens of different States; . . ."; and U. S. Code, Title 28, Sec. 1441 [formerly the Act of Mar. 3, 1875, *supra,* Sec. 2; 28 U. S. C. A., Sec. 71] providing that "Any civil action brought in a State court of which the district courts . . . have original jurisdiction, may be removed . . . to the district court . . ."

2. The existence of the jurisdiction is shown by the following allegations of the complaint: (a) "Plaintiff is a resident of the County of Los Angeles, State of California. . . . Defendant, Loew's Incorporated, is a corporation organized under the laws of Delaware; it maintains a principal office and transacts business in the County of Los Angeles, State of California. . . ." [R. 2]; (b) "On or about December 5, 1945, plaintiff and defendants[2] entered into a contract, a copy of which is attached hereto as Exhibit 'A' . . ." [R. 3] which contract as amended provided for compensation to plaintiff at the rate of $1350 per week [R. 23, 33]; (c) On or about December 2, 1947, defendant suspended plaintiff's

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[2]In addition to Loew's Incorporated several fictitious defendants were named. [R. 2.] None was ever served and the cause was dismissed as to them at the commencement of the trial.

employment and compensation under said contract [R. 3-5]; (d) "A controversy affecting the rights of the parties under the said agreement now exists in this . . . Defendants contend and assert that on December 2nd, 1947 they had, and that they now have, the right . . . to suspend and to continue to suspend payment of compensation to the plaintiff . . ." which right the plaintiff denies [R. 3-5]; (e) "Wherefore plaintiff prays for a judgment declaring that . . . the plaintiff is entitled to compensation at the rate provided in the said contract of employment from December 5, 1945 to the date of judgment to be rendered in this action, giving the defendant credit for compensation heretofore paid. . . ."[3] [R. 6.]

3. The statutory provisions believed to sustain the jurisdiction of the Court of Appeals are U. S. Code, Section 1291 [formerly the Act of Mar. 3, 1891, Chap. 517, Sec. 6, 26 Stat. 828, as amended; 28 U. S. C. A. Sec. 225(a)] providing that the "court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."; and U. S. Code, Section 1294 [formerly the Act of Mar. 3, 1891, *supra;* 28 U. S. C. A. Sec. 225(d)] providing that "Appeals from reviewable decisions of the district . . . courts shall be taken . . . (1) From a district court of the United States to the court of appeals for the circuit embracing the district; . . ."

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[3]The complaint was filed on January 7, 1948 [R. 38] so that there was already in controversy at that time compensation in an amount exceeding $3000, *i. e.* 5 weeks at $1350 per week.

STATEMENT OF THE CASE.

A. The Pleadings and Issues.

1. In his complaint the plaintiff alleged that he was an experienced writer in the motion picture industry and that the defendant was engaged in the business of producing motion pictures; that on December 5, 1945, he was employed by the defendant, for a period of two years (with options to extend the term) as a writer under a written contract, a copy of which was attached; and that until December 2, 1947, the contract was performed by both parties, after which performance by plaintiff was prevented. [R. 2-3.] It appears from the contract attached to the complaint that among the obligations undertaken by plaintiff was the following [R. 12]:

> "5. The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general."

On December 2, 1947, the complaint continues, defendant served on plaintiff the following notice [R. 3-4]:

> "Dear Mr. Cole:
>
> "At a recent hearing of a committee of the House of Representatives, you refused to answer certain questions put to you by such committee.
>
> "By your failure to answer these questions, and by your statements and conduct before the committee and otherwise in connection with the hearings, you have shocked and offended the community, brought yourself

into public scorn and contempt, substantially lessened your value to us as an employee, and prejudiced us as your employer and the motion picture industry in general. By so doing you have violated your obligations under your contract of employment with us and your legal obligations to us as our employee.

"Accordingly, and for good and sufficient cause, this is to notify you that we have elected to suspend your employment and payment of your compensation under your contract of employment with us dated December 5, 1945, as amended, commencing as of December 3, 1947, and continuing until such time as you are acquitted or have purged yourself of contempt of the Congress of the United States and you declare under oath that you are not a Communist.

"This action is taken by us without prejudice to, and we hereby reserve, any other rights or remedies which we may have.

Very truly yours,

LOEW'S INCORPORATED,

By LOUIS K. SIDNEY,

Asst. Treasurer."

The controversy between the parties is then alleged to consist of defendant's contention that it had the right to suspend and continue to suspend plaintiff's employment and compensation; and plaintiff's contention that every statement of fact in the notice was false and untrue and that notwithstanding the truth or falsity thereof defendant did not and does not have the right to suspend or continue to suspend plaintiff's employment or compensation for any reason or on any ground whatever. [R. 4-5.]

Plaintiff's readiness, willingness and ability to perform were alleged in the conventional form; as well as the irreparable injury to plaintiff assertedly flowing from the suspension.[3a] [R. 5-6.]

The relief prayed was a judgment declaring that defendant does not have and never had any right to suspend plaintiff's employment or compensation and that plaintiff is entitled to compensation at the contract rate; and enjoining defendant from continuing the notice of suspension in effect. [R. 6.]

2. The answer admitted execution of the contract and commencement of performance under it but denied that plaintiff had well or truly performed, that he was ready, willing or able to perform, or that he had been prevented by defendant from performing. The existence of the controversy was admitted but the correctness of plaintiff's contentions was denied, as was also the fact of any irreparable injury to him. [R. 41-2.] The prayer was for a declaration of the rights and duties of the parties in accordance with defendant's claims. [R. 42.]

3. After a series of pre-trial conferences held pursuant to F. R. C. P., Rule 16, a formal pre-trial order was entered. [R. 77-85.] That order recited certain stipulations of fact entered into by counsel and then provided [R. 84-5]:

[3a]Attention is directed to the fact that there is no suggestion that any element of waiver or condonation of a breach of contract by plaintiff is involved.

"The following issues of fact remain for determination:

"(A) What were plaintiff's acts, conduct and activities, severally and/or in association or concert with others, in respect of the matters referred to in the notice [of suspension] marked 'Plaintiff's Exhibit 3'?

"(B) Did plaintiff by his conduct and activities during and in connection with his said appearance as a witness before the Committee on Un-American Activities shock and offend the community, bring himself into public scorn and contempt, substantially lessen his value as an employee to defendant Loew's Incorporated, prejudice the interests of said employer and/or the motion picture industry generally, and render himself unable to render the kind and quality of services required and contemplated by the contract of employment and/or the employment relationship created thereby?

"(C) Did plaintiff by his said conduct and activities injure or prejudice the interests of defendant Loew's Incorporated, or bring about the likelihood or danger of any such injury or prejudice?

"(D) Did the act of defendant Loew's Incorporated in delivering and putting into effect the notice marked 'Plaintiff's Exhibit 3' cause irreparable injury to plaintiff?"

It will be noted that no issue in respect of waiver or condonation of plaintiff's alleged breach of contract was specified in this order settling the issues.[4]

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[4]Nevertheless, and over defendant's objection, the issue of waiver was submitted to the jury. [See, Point I, C, 1, *infra,* pp. 78-9.]

B. The Facts.

1. The Congressional Investigation and Plaintiff's Conduct in Connection Therewith.

In 1947 and for some time prior thereto considerable public attention had been directed to claims that a number of Communists had infiltrated into responsible, creative positions in the motion picture industry and were thus enabled to use and were in fact using their influence to disseminate pro-Communist and un-American propaganda through the medium of the screen. Accordingly the Committee on Un-American Activities of the House of Representatives,[5] pursuant to its statutory authorization "to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principles of the form of government as guaranteed by our Constitution. . . ." [*Legislative Reorganization Act of 1946,* Act of Aug. 2, 1946, Chap. 753, Title I, Part 2, Sec. 121(q), 60 Stat. 828], undertook an investigation into alleged Communistic infiltration of the motion picture industry. [R. 351-3, 321, 363, 571-2, 621, 79-84.]

During the month of May, 1947, a sub-committee of the Congressional Committee pursued the investigation by means of a closed hearing in Los Angeles. In connection with this hearing a number of persons identified with the motion picture industry were interviewed and a considerable number were examined. Nation-wide publicity was given to this investigation, which was being had behind

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[5]Hereinafter for convenience referred to as the "Congressional Committee" or the "Committee."

closed doors, and to the participation therein of various motion picture personalities. [R. 351-2, 321, 638-43, 755.] In June, 1947, Mr. Smith and Mr. Leckie, two investigators employed by the Committee, appeared in Los Angeles and interviewed a number of motion picture executives and others connected with the industry for the purpose of securing information and for the purpose of procuring testimony at an open hearing by the Committee to be presently held. Plaintiff had knowledge of the presence and of the activities of these investigators and their presence and activities were the subject of comment in the press and other media of public information. [R. 287-91, 299-300, 321-34, 658, 758-9.]

Commencing on October 20 and continuing through October 30, 1947, an open hearing was held by the Committee in Washington, D. C. A large number of motion picture executives, actors, writers and directors had been served with subpoenas to attend and testify and among these was the plaintiff Lester Cole and some eighteen others who came to be known and referred to as the "unfriendly witnesses." [R. 321, 505-6, 417-19, 501, 620-1 625, 644-5, 411-12.]

Before the open hearing was discontinued eleven of the "unfriendly witnesses" were called to testify. Plaintiff was the last of the unfriendly witnesses to be called to the stand. [R. 426, 533, 535, 485, 646.] Following is his complete testimony[6] [R. 478-84]:

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[6]At the trial of the instant case there was produced for the jury's hearing and sight a sound motion picture of plaintiff on the stand before the Committee; and also a phonographic recording of his testimony. [R. 477-8; 698-702.] An offer by defendant to produce and exhibit a similar motion picture of the appearances and testimony of nine others of the unfriendly witnesses was denied by the trial court. [See, Point II, A, *infra,* pp. 110-12.]

"Mr. Stripling: Mr. Cole, will you please state your full name and present address?

Mr. Cole: Lester Cole, 15 Courtney Avenue, Hollywood, Calif.

Mr. Stripling: When and where were you born, Mr. Cole?

Mr. Cole: I was born June 19, 1904, in New York City.

Mr. Stripling: What is your occupation?

Mr. Cole: I am a writer.

Mr. Stripling: How long have you been a writer?

Mr. Cole: For approximately 15, 16 years.

Mr. Stripling: How long have you been in Hollywood?

Mr. Cole: Since—I first came to Hollywood in 1926; I left and went back to New York in 1929; returned in 1932, and have been there ever since.

Mr. Stripling: Are you a member of the Screen Writers Guild?

Mr. Cole: Mr. Chairman, I would like at this time to make a statement."

[Statement was then read by Committee.]

"Mr. McDowell: I think it is insulting, myself.

The Chairman: This statement is clearly another case of vilification and not pertinent at all to the inquiry. Therefore, you will not read the statement.

Mr. Cole: Well, Mr. Chairman—

The Chairman: Mr. Stripling, ask the first question.

Mr. Cole: Mr. Chairman, may I just ask if I do not read my statement—

The Chairman: You will not ask anything.

Mr. Cole: Is the New York Times editorial pertinent—the editorial in the Herald Tribune pertinent?

The Chairman: Go ahead and ask the question.

Mr. Stripling: Mr. Cole, are you a member of the Screen Writers Guild?

Mr. Cole: I would like to answer that question and would be very happy to. I believe the reason the question is asked is to help enlighten—

The Chairman: No, no, no, no, no.

Mr. Cole: I hear you, Mr. Chairman, I hear you, I am sorry, but—

The Chairman: You will hear some more.

Mr. Cole: I am trying to make these statements pertinent.

Mr. Chairman: Answer the question, 'Yes' or 'no.'

Mr. Cole: I am sorry sir, but I have to answer the question in my own way.

The Chairman: It is a very simple question.

Mr. Cole: What I have to say is a very simple answer.

The Chairman: Yes; but answer it 'yes' or 'no.'

Mr. Cole: It isn't necessarily that simple.

The Chairman: If you answer it 'yes' or 'no,' then you can make some explanation.

Mr. Cole: Well, Mr. Chairman, I really must answer it in my own way.

The Chairman: You decline to answer the question?

Mr. Cole: Not at all, not at all.

The Chairman: Did you ask the witness if he was here under subpoena?

Mr. Cole: What is it, Mr. Chairman? I beg your pardon?

Mr. Stripling: Mr. Cole, you are here under subpena served upon you on September 19, are you not?

Mr. Cole Yes; I am.

Mr. Stripling: And the question before you is: Are you a member of the Screen Writers Guild?

Mr. Cole: I understand the question, and I think I know how I can answer it to the satisfaction of the committee. I wish I would be permitted to do so.

The Chairman: Can't you answer the question?

Mr. Cole: You wouldn't permit me to read my statement and the question is answered in my statement.

The Chairman: Are you able to answer the question 'yes' or 'no,' or are you unable to answer it 'yes' or 'no'?

Mr. Cole: I am not able to answer 'yes' or 'no.' I am able, and I would like to answer it in my own way. Haven't I the right accorded to me, as it was to Mr. McGuinness and other people who came here?

The Chairman: First, we want you to answer 'yes' or 'no,' then you can make some explanation of your answer.

Mr. Cole: I understand what you want, sir. I wish you would understand that I feel I must make an answer in my own way, because what I have to say—

The Chairman: Then you decline to answer the question?

Mr. Cole: No; I do not decline to answer the question. On the contrary, I would like very much to answer it; just give me a chance.

The Chairman: Supposing we gave you a chance to make an explanation, how long would it take you to make that explanation?

Mr. Cole: Oh, I would say anywhere from a minute to 20, I don't know.

The Chairman: Twenty?

Mr. Cole: Sure. I don't know.

The Chairman: And would it all have to do with the question?

Mr. Cole: It certainly would.

The Chairman: Then would you finally answer it 'yes' or 'no.'

Mr. Cole: Well, I really don't think that is the question before us now, is it?

The Chairman: Then go to the next question.

Mr. Stripling: Mr. Cole, are you now or have you ever been a member of the Communist Party?

Mr. Cole: I would like to answer that question as well; I would be very happy to. I believe the reason the question is being asked is that because at the present time there is an election in the Screen Writers Guild in Hollywood that for 15 years Mr. McGuinness and other—

The Chairman: I didn't even know there was an election out there. Go ahead and answer the question. Are you a member of the Communist Party?

Mr. Cole: If you don't know there is an election there you didn't hear Mr. Lavery's testimony yesterday.

The Chairman: There were some parts I didn't hear.

Mr. Cole: I am sorry, but I would like to put it into the record that there is an election there.

The Chairman: All right, there is an election there. Now, answer the question. Are you a member of the Communist Party?

Mr. Cole: Can I answer that in my own way, please? May I, please? Can I have that right? Mr. McGuinness was allowed to answer in his own way.

The Chairman: You are an American, aren't you?

Mr. Cole: Yes, I certainly am, and it states so in my statement.

The Chairman: Then you ought to be very proud to answer the question.

Mr. Cole: I am very proud to answer the question, and I will at times when I feel it is proper.

The Chairman: It would be very simple to answer.

Mr. Cole: It is very simple to answer the question—

The Chairman: You bet.

Mr. Cole (continuing): And at times when I feel it is proper I will, but I wish to stand on my rights of association—

The Chairman: We will determine whether it is proper.

Mr. Cole: No, sir. I feel I must determine it as well.

The Chairman: We will determine whether it is proper. You are excused."

The statement referred to in this transcript was introduced in evidence below. It reads as follows [R. 473-5]:

"Statement by Lester Cole

"Submitted to House Un-American Activities Committee October 30, 1947.

"I want to say at the outset that I am a loyal American, who upholds the Constitution of my country, who does not advocate force and violence, and who is not an agent of a foreign power.

"This Committee has announced many times its interest in facts pertinent to this inquiry. I believe many such facts are embodied in this statement.

"I have been a working screen-writer in the Motion Picture Industry since 1932. To date, I have written thirty-six screen plays, the titles of which and companies which produced them are attached.

"I was working in Hollywood in 1933 when screen writers, faced with an arbitrary fifty per cent cut in salaries, formed the Screen Writers' Guild for the purpose of collective bargaining.

"From the very start there were attempts to create strife within the industry by groups who used the same technique employed by this committee.

"After years of failure by James Kevin McGuinness, Rupert Hughes and other of your friendly witnesses to disrupt the Screen Writers' Guild, and with it the industry, a desperate appeal was made to Martin Dies, former Chairman of this Committee. Or maybe Martin Dies made the appeal; at any rate the investigations began.

"When the Dies investigation proved unsuccessful because of the united resistance of the men and women of the industry, a new tactic was employed. Willie Bioff and George S. Browne were called into the fray.

"These two men, Browne and Bioff who ran the IATSE, the union which was represented here the other day by Mr. Roy Brewer, took on the job of creating chaos in the industry. They bought full page advertisements in the Hollywood trade papers, the 'Reporter' and the 'Daily Variety,' announcing their intentions of taking over all independent Hollywood Guilds and Unions, but only, of course, for one purpose; the eradication of Communism. You will recall that Al Capone, just before going to jail, called upon the American people to 'eradicate' all subversive un-American influences in American life, including Communism. By a strange coincidence, the warning of Browne and Bioff also was issued but a short time before they too went to jail for the extortion of huge sums of money; a shakedown of the motion picture industry.

"For fifteen years these men have engaged in slander, malicious gossip, near libel; in fact, in every

method known to man but one—traditional American democratic procedure.

"As in years gone by they accommodated Martin Dies, and later extortionists Browne and Bioff, today McGuinness, Incorporated, is playing footsies with the House Committee on Un-American Activities. They think the Committee is stooging for the Motion Picture Alliance; the reverse is true.

"From what I have seen and heard at this hearing, the House Committee on Un-American Activities is out to accomplish one thing, and one thing only, as far as the American Motion Picture Industry is concerned; they are going either to rule it, or ruin it.

"This Committee is determined to sow fear of blacklists; to intimidate management, to destroy democratic guilds and unions by interference in their internal affairs, and through their destruction bring chaos and strife to an industry which seeks only democratic methods with which to solve its own problems. This Committee is waging a cold war on democracy.

"I know the people in the motion picture industry will not let them get away with it."

About two hundred copies of that statement had been prepared by plaintiff prior to his appearance before the Congressional Committee. After his withdrawal from the stand he distributed over a hundred copies to various press representatives covering the hearing. [R. 859.]

As a consequence of his refusal to answer the question directed to Communist Party membership plaintiff was cited and subsequently indicted for contempt of Congress. At the time of the trial below the indictment against

plaintiff was undetermined, for reasons which are not deducible from the record here.[7] [R. 853-4, 861-2.]

At no time was the plaintiff's intention not to answer any question relating to Communist membership made known to the defendant. Defendant's first knowledge of plaintiff's intention to defy the Congressional Committee in this regard came through learning of plaintiff's actual conduct on the witness stand. [R. 309-10, 351, 420-1, 499, 743-4.]

The preparations for this hearing and the conduct and testimony of the persons appearing, including plaintiff and the other unfriendly witnesses, were given extensive and intensive nation-wide—in fact, world-wide—publicity. Accounts of the matter were prominently featured in the daily press throughout the country and over the radio; broadcasts of the actual testimony were made over the radio; news-reels depicting the scene and reproducing the testimony were disseminated in the nation's theatres; and the whole matter was the subject of wide-spread editorial comment. [R. 351-3, 471, 651, 656-64, 778, 859. See Deft. Exs. G and H, R. 783-4.] In short, the evidence shows that the hearings were so thoroughly communicated to the public generally as to make them the leading current topic of news and discussion.

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[7]The record indicates that at least two other of the unfriendly witnesses were cited for contempt. [R. 648-9.] Any effort to prove the fate of these citations, or what occurred with reference to the remainder of the ten men who testified and who were part of the group of which plaintiff was a member, would have been fruitless in view of the trial court's frequently announced determination to exclude any testimony going beyond plaintiff's individual conduct. [See, Point II, A, *infra,* pp. 110-12.]

2. Plaintiff's Collaboration With and the Conduct of Other Unfriendly Witnesses.

While evidence of the conduct and testimony before the Committee of the other unfriendly witnesses was excluded below, the close relationship of the group was such that it could not be concealed even by the most determined effort; and some incidental evidence in that regard, which came in *apropos* of other matters, justifies the following statements. The nineteen unfriendly witnesses were jointly represented by a battery of six lawyers (four of whom appeared for the plaintiff in the court below). [R. 415-18.] Prior to the commencement of the hearing they joined in a public advertisement of an "open letter" to the motion picture industry relating to the forthcoming hearing. [R. 638-43.] They conferred together prior to and during the hearings, including a discussion of the manner in which they would conduct themselves before the Committee, and they joined in a motion to quash the service of subpoenas upon them. [R. 624-33, 648, 425-7.] And in a conversation after the hearing, with Mr. L. B. Mayer (defendant's studio head) the plaintiff stated that the conduct of all of the ten had been the subject of an agreement among them. [R. 362-3.]

On their behalf as a group, their attorneys requested and held a meeting with Eric Johnston, President of the Motion Picture Association of America and the Association of Motion Picture Producers, and Messrs. McNutt and Benjamin, counsel appearing for the Association. This meeting took place the night before the hearings commenced. It was concerned with a discussion of the motion to quash which had been or was being filed by the unfriendly witnesses, and of the position which the Association planned to take at the hearings. In these discussions, plaintiff's attorneys were told that the motion

picture industry had publicly welcomed the investigation, asking only for a fair hearing, and so could not join in any attack on the validity or legality of the investigation. At the end of the meeting Mr. Johnston was asked if there was any truth in rumors that he had agreed with the Committee on a blacklist, to which he replied that he had not and would not stand for any such thing.[8] [R. 405-28, 737-49, 768-72.]

Eleven of the nineteen unfriendly witnesses were called to the stand at the Committee hearing in Washington. Each of them had prepared and requested permission to read a statement, but only two were allowed to do so. [R. 426, 530, 533, 646.] Although defendant attempted to introduce complete evidence of their testimony and conduct, such evidence was excluded by the rulings of the trial judge. [See, Point II, A, *infra,* pp. 110-12.] It is, however, reasonably inferrable from the record that each of them was asked if he was or ever had been a member of the Communist Party and that ten of them refused to answer that question. [R. 362, 379-86, 284-7.]

3. The Action of the Motion Picture Industry With Respect to Plaintiff and the Other Unfriendly Witnesses.

As a consequence of the conduct of the unfriendly witnesses before the Congressional Committee and the resulting nation-wide furore, representatives of the defendant and of a large majority of the motion picture producing companies met in New York on November 24 and 25, 1947. After discussions extending over a period of two days, and with the advice of former Justice James F.

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[8]Mr. Johnston and Mr. Benjamin testified that the answer to this query was only to the effect that Mr. Johnston had made no agreement or "deal" with the Committee. [R. 742, 771.] In the text above, however, we have adopted the version given by plaintiff's attorney and witness, Robert W. Kenny.

Byrnes, a declaration of policy was adopted.[9] [R. 282-7, 336-9, 354-7, 375-6, 389-95, 784-92, 812-17.]

The gist of the declaration of policy was that of the "ten Hollywood men . . . cited for contempt by the House of Representatives . . ." those who were then employed would be discharged or suspended, and none of the ten would be employed or re-employed until they had been acquitted or purged of contempt and had declared under oath that they were not Communists. [R. 285-6.] Pursuant to this policy, in which the defendant concurred, plaintiff was suspended. [R. 339-40.]

The discussion which led up to the adoption of this policy was gone into below at some length, but subject to a limiting ruling that the testimony in respect thereof was admitted only to show the nature of the discussion and was not to be taken as evidence of the facts recited.[10] [R. 385-6, 792-3.] For the purpose of this statement the discussion may be summarized as one in which it was the consensus that the unfriendly witnesses had led the public, or a substantial part thereof, to believe that the unfriendly witnesses were Communists and that the motion picture industry was harboring Communists and fostering Communism; that the unfriendly witnesses, as a consequence

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[9]The fact of the meeting, portions of its proceedings and the accomplishment of the meeting, *i. e.*, the declaration of policy, were introduced in evidence by plaintiff. Through the door so opened by plaintiff defendant sought to introduce evidence showing that the reasons for the adoption of the policy rested in the testimony and conduct before the Committee of the unfriendly witnesses and the public reaction to that testimony and conduct. The trial court refused the proffered evidence and the door which had been thrown wide open by plaintiff was tightly closed to defendant by the rulings of the trial court.

[10]The actual facts could not be proved because of the trial court's exclusion of any evidence of the testimony and conduct of the ten men and the effect on the public of that testimony and conduct. [See Point II, A, *infra,* pp. 110-12.]

of this belief which they had created, had shocked and offended the community and had brought themselves and the industry into public scorn and contempt; and that the retention of the unfriendly witnesses as employees in the industry would create new and aggravate the already created public ill-will against the industry. [R. 786-92, 380-95.]

4. Contractual and Business Relations of the Parties.

a. The Contract.

The plaintiff has been engaged as a motion picture writer since about 1932. He was first employed in that capacity by the defendant in 1945. At that time his employment was on a free-lance or week-to-week basis. Late in 1945, after discussions looking toward that end, he was employed under a term contract which, as amended in 1947, is the contract in suit. [R. 430-3.] The significant provisions of that contract are those contained in paragraph 5, by virtue of which plaintiff was expressly obligated not to do any act or thing which would tend to bring him into public hatred, contempt, scorn or ridicule or which would tend to shock, insult or offend the community or prejudice his employer or the motion picture industry generally. [R. 12. Quoted, *supra,* p. 6.]

Other provisions of the agreement which may assume some importance in the argument are paragraphs 11 and 12, relating to defendant's rights and remedies in the event of plaintiff's "failure, refusal or neglect . . . to perform his required services . . . or observe any of his obligations . . . to the full limit of his ability or as instructed. . . ." [R. 17-21.]

b. The Amendment.[11]

At the time of plaintiff's original term employment he was informed that if, after a year, his services were satisfactory an adjustment of his compensation would be made. Accordingly, in the spring of 1947 and down to about the middle of August of that year, plaintiff and his agent had a series of conversations with various of defendant's executives looking to such an adjustment. In the course of these negotiations, according to plaintiff and his agent, plaintiff became fearful that the consummation of a satisfactory revision was being delayed or forestalled by defendant's concern over almost daily attacks upon plaintiff then assertedly appearing in the Hollywood Reporter, a motion picture trade publication. These attacks, said to identify plaintiff by name, charged him with Communist membership and activity. Pointed inquiry, therefore, was made of defendant's executives in this regard by plaintiff and his agent and assurances were given that defendant was not at all interested in plaintiff's politics or the charges assertedly made against him. [R. 256-8, 304-6, 318-20, 353-4, 376-7, 396-405, 434-40, 549-72.]

In point of fact, however, when plaintiff was confronted with a complete file of the Hollywood Reporter for the period during which these discussions took place, he admitted, after examination of the file, that there were no articles or stories, of the sort he and his agent had previously described, in which he was named. [R. 571-2.]

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[11]The evidence in this connection, consisting largely of conversations, was admitted over defendant's objection that the negotiations were merged in the written agreement. [R. 434-5, 431-2, 436-7.] It is now the basis upon which the claim of waiver or condonation mainly rests. At the time it was offered, however, there was no intimation of this purpose. [See Point I, C, 1, *infra,* pp. 78-9.] The first suggestion of condonation was vouchsafed at a late stage in the trial in reply to defendant's objection that some proposed testimony was not within the issues. [R. 694-5. See note 12, *infra,* p. 26.]

In any event, the result of these negotiations was the execution, on or about September 19, 1947, of the amendatory agreement. On that day plaintiff was told in a telephone call from E. J. Mannix, one of defendant's executives, that a United States Marshal was in the latter's office with a subpoena to serve. In response to Mannix' query if he wanted "to duck" or "get out" plaintiff replied, "Of course not," that he was in the barber shop and the marshal could effect service there. Mannix, however, suggested that plaintiff should go to the office of Floyd Hendrickson, head of defendant's contract department, instead. There plaintiff was served with a subpoena to appear at a hearing of the Congressional Committee in Washington, D. C., after which Mr. Hendrickson said, "Now that that is over, let's get down to our business." Plaintiff and Hendrickson then read over the final draft of the amendment, and after plaintiff's agent had been called and had read it, plaintiff signed. It was signed by the defendant a day or so later. [R. 446-8, 449.]

By the terms of the amendment, defendant exercised its first option to extend plaintiff's employment for a term of two years at a salary of $1350 per week; agreed not to exercise its right to lay off plaintiff during the extended term, so that plaintiff would receive 52 weeks' compensation each year instead of a guaranteed minimum of 40 weeks; agreed to give plaintiff a vacation of six weeks with pay each year and, at plaintiff's election, an additional six weeks each year without pay. [R. 33-38.]

c. Plaintiff's Performance.

Plaintiff rendered his services as a writer from the execution of the term contract to December 3, 1947, on which day he received the notice of suspension previously quoted. [*Supra,* pp. 6-7.] During that time he wrote

or collaborated in the writing of the screenplays for "Romance of Rosy Ridge," "Fiesta," "High Wall" and "Mercer Girls," the latter of which was not produced. At the time of the suspension he was working on the screenplay for a proposed photoplay entitled "Zapata." [R. 304, 307-9, 313-14.] The three pictures which were produced continued in distribution following plaintiff's suspension. [R. 343-4.] Plaintiff's name appeared on the screen as the writer or one of the writers of the pictures although not as prominently or in type as large as that in which the names of the stars appeared. [R. 655, 867.]

When plaintiff left Los Angeles to attend the Committee hearing in Washington he volunteered to complete the story outline for "Zapata" while there; and some of his notes in that regard were delivered to Mr. Cummings, the producer of the picture, while plaintiff was still in Washington. On plaintiff's return from the hearings, in the early part of November, 1947, he continued to confer with Mr. Cummings, although a decision as to whether the production should be continued was then being awaited. No decision in that regard had been made at the time of the suspension. [R. 307-8, 449-50, 489-90, 540-48, 694.] Plaintiff's salary was paid regularly until he was suspended.[12] [R. 694-6.]

Plaintiff's services, apart from his conduct in connection with the Congressional investigation into Communism, were admittedly satisfactory. In fact, it is clear from the testimony that, but for the situation which gave rise to the suspension, defendant would have been glad, indeed anxious, to keep him in its employ. [R. 257-8, 303, 317, 346.]

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[12]Questioning along this line was objected to by defendant as immaterial and not within the issues. It was at this point—redirect examination of plaintiff and near the close of his case—that the first suggestion of a claim of condonation was made. [R. 694-5.]

d. Non-Contract Discussions Between the Parties.

Two conversations between plaintiff and Mr. Louis B. Mayer, head of defendant's studios, and one with Howard Strickling, defendant's public relations director, appear in the record.[13] The first of these took place probably in July or August, 1947, between Mr. Mayer and plaintiff in the former's office. On that occasion Mr. Mayer told plaintiff of the visit made by the Committee's investigators on Mr. Mannix in which the company had been requested to discharge another writer and plaintiff because they were Communists and to which request Mannix replied that he did not "know whether they are Communists or not," that no crime had been committed and that he would hire them if they did the work required of them;[14] and that Mr. Mayer intended to tell the investigators the same thing. Mr. Mayer spoke of the plans he had for plaintiff at the studio, expressed the wish "that all this business, talk about people being Communists did not arise . . . ," and hoped that plaintiff would curtail his activities in the Screen Writers Guild. Mr. Mayer recalled asking plaintiff why he did things which caused him to be branded as

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[13]Both plaintiff and Mr. Mayer testified to these conversations. For the most part their respective versions were complementary rather than contradictory of each other. The summary which follows, therefore, is an amalgam of the two versions. Conflicts, where there were any, are noted. The significance of these conversations is that in charging on the subject of waiver the trial court made specific reference to a part only of this testimony, ignoring that part of it, as well as other evidence, which tended to a finding of non-waiver. [Point I, C, 2, 6, *infra,* pp. 80-2, 93-4.]

[14]This third-hand hearsay report (from Mannix to Mayer to plaintiff) of what transpired between Mr. Mannix and the investigators is at variance with Mr. Mannix' direct and uncontradicted account of the actual occurrence. According to him the investigators merely asked whether he knew if these writers were Communists, to which he replied, "No, and I don't give a damn whether they are Communists or not. All I am looking for is getting people to write scripts. . . ." [R. 289, 298-301.]

a Communist to which plaintiff's rejoinder was, in substance, that he was not a Communist but having been born in poverty he sided with the underprivileged. In that connection plaintiff recounted an anecdote about his father who, after having been a rabid and active Socialist became the owner of a tie shop. He presented plaintiff with a number of ties which did not bear the union label and justified its absence by the remark that "unions are no good for small plants. . . ." [R. 348-51, 440-43.]

Reference was also made in this conversation by plaintiff to the differences between himself and a James K. McGuinness (an executive of defendant) and the latter's asserted use of the smear technique in stirring up strife and bringing about the Congressional investigation.[15] [R. 442-3, 519-22.]

While on the train returning from the Washington hearing plaintiff spoke with Howard Strickling. The latter told him that Mr. Mayer was terribly upset over the results of the hearing, and they discussed the bad treatment which Mayer had received at the hands of the Committee. Strickling went on to say that "he was terribly upset particularly about the effect of this" on Mr. Trumbo and plaintiff and that he was seeking some public relations formula—some statement we could make which the studio could publicize or some other method—which would overcome what he felt was a bad press, and "whereby we could, Mr. Trumbo and myself, get out of this." Mr. Strickling also said that he wanted plaintiff to give

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[15]Mr. McGuinness testified, without contradiction, that he had not named plaintiff in his testimony before or discussions with the Committee, that he had not requested or asked anyone else to request the holding of any investigation, and that he had never opposed plaintiff's employment by defendant or expressed any opinion with respect thereto. [R. 749-65.]

the matter some thought and that when they got back to the studio they would get together and see what could be worked out along those lines. He also told plaintiff that Mr. Mayer, who was on the train, wanted to see plaintiff. [R. 574-6, 682-3.]

Mr. Mayer and plaintiff then had a discussion. The former's recollection of that conversation follows [R. 362-3]:

> "We talked about the hearing and I said it is very unfortunate; that I thought he acted very unwisely and had bad advice, because, if he belongs to the Communist Party, the FBI no doubt has got a record of it, and it was no crime, as I saw it, to belong to the Communist Party at the present time, and he should have answered. Well, he thought some personal rights were involved. And I said, 'You could have told the chairman that "I am advised you have no right to ask me these questions but I can't afford not to answer them. No; I am not a Communist" or "I am a Communist or belong to the Communist Party but I never heard anything subversive or any violence or I would have walked out on them, which ever the case may be, and then you are clear. You wouldn't have any problem on your hands.' 'Well, he said, 'I had to stick with the gang. They agreed to do it that way and I had to be with them.' I said, 'It was unfortunate,' or words to that effect. I can't recall exactly but the essence was what I told you.
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> * * * * * * * *
>
> "If I remember right, I told him I thought he had a great opportunity if this thing hadn't sprung up, but I didn't know what this would do, where it would take us. I think that brought his answer that he had to stick with the crowd or the other fellows and couldn't break away from them."

Plaintiff made no direct denial of this testimony. He did, however, testify that Mr. Mayer said that this matter placed him [Mr. Mayer] in a position where it would be rather difficult for him to go through with the plans that he had had in regard to making plaintiff an executive; but that nothing was said *directly* in regard to plaintiff's conduct before the Committee. [R. 489.] Plaintiff also testified that in this conversation Mr. Mayer was upset over the treatment accorded him, Mr. Trumbo and plaintiff by the Committee; but, in narrating the same conversation in his deposition, no reference was made by plaintiff to any such discussion with Mr. Mayer. [R. 487, 572-89.]

On arriving in Los Angeles, following his conversation with Mr. Strickling about public relations, and after he had learned of the statement of policy adopted by the motion picture companies on November 25, 1947, relating to employment of the ten unfriendly witnesses, plaintiff prepared, and on November 28, 1947, executed an affidavit. [R. 687-9.] It reads as follows [R. 688-9]:

"STATEMENT

"On October 30, 1947, I appeared as a witness in Washington, before the Thomas-Rankin Committee. In a prepared statement, under oath, I was refused permission to say that I was a loyal American citizen, who upheld the Constitution of the United States, who did not believe in violence and force to overthrow our government, and who was not an agent of a foreign power.

"Since childhood, in our public schools, I have given my oath of allegiance. I always will, and now do so again:

"I pledge allegiance to the Flag of the United States of America and to the Republic for which

it stands; one nation indivisible, with liberty and justice for all.

"In taking this pledge, I further solemnly swear that I will continue to resist, with all my strength, under all pressure, economic and social, the current drive to subvert this pledge, in spirit if not in letter, to read: 'I pledge allegiance to the Thomas-Rankin Committee, and to the anti-democratic forces for which it fronts; one nation divided, with fear and insecurity for all.'"

A copy of this affidavit was sent by plaintiff to Mr. Strickling and one to Mr. Mayer. [R. 689.]

5. Plaintiff's Awareness of the Possible Consequences of His Conduct.[16]

Plaintiff was present at and heard substantially all of the testimony given before the Committee at the Washington hearing. Before plaintiff had taken the stand, therefore, he heard Mr. Mayer testify that the latter was unalterably opposed to Communism; that Communists should be denied the sanctuary of the freedom they sought to destroy; that he hoped a law would be passed regulating employment of Communists in private industry; and that if he knew that men employed by him believed in and subscribed to the doctrine of Communism he would not keep them in his employ. [R. 363-7, 505-6, 513-19.]

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[16]The significance of this testimony is two-fold. In the first place it is part of the evidence, to which the trial court did *not* direct the jury's attention, bearing upon the question whether plaintiff was justified in believing that nothing would happen to him if he conducted himself as he did. [Point I, C, 2, 6, *infra,* pp. 80-2, 93-4.] And in the second place it tends to establish the wilful nature of that conduct and plaintiff's contemplation of the consequences which might ensue from it.

He also heard Mr. Johnston testify that if the evidence regarding the Communistic affiliations of John Howard Lawson (one of the unfriendly witnesses) was true Mr. Johnston would not employ him because he would not employ any proven or admitted Communists as they could be a disruptive force in the motion picture industry.[17] [R. 506-13.]

Plaintiff, before he took the stand, heard the testimony of the other nine unfriendly witnesses. He knew, therefore, of the line of inquiry which had been pursued by the Committee with respect to those witnesses and considered and discussed with them the possibility that the same line would be pursued with him. [R. 533-40, 645-8.] He heard the Committee Chairman announce that by unanimous vote a subcommittee had recommended that Samuel Ornitz and Herbert Biberman (two of the unfriendly witnesses) be cited for contempt; and he considered the possibility of being himself cited for contempt if he testified as he expected to testify; although in another part of his cross-examination he said that he did not consider that possibility. [R. 646-8.]

Efforts, on cross-examination of plaintiff, to show his knowledge or awareness of the state of public opinion in this country with respect to Communists and Communist sympathizers were cut short upon plaintiff's objection; as were also efforts to show that his real reason for refusing to answer the Committee's questions was not the high duty of preserving constitutional rights professed by him, but rather a desire not to admit Communist Party membership. [Point II, D, *infra,* p. 118.]

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[17]Mr. Johnston was characterized below as the "spokesman" for the motion picture industry. [R. 798.]

6. Defendant's Claimed Course of Conduct.

In addition to the portion of the conversations with Mr. Mayer to which the trial court particularly directed the jury's attention, the rendition of services and payment of salary after the hearings, and other matters which have already been narrated, the basis for the claim of waiver or condonation in this cause is thought to be found in plaintiff's knowledge of certain statements by representatives of the motion picture industry which plaintiff heard or read before he took the stand in Washington. Included in this category was an open letter to Congress signed by Mr. Johnston and published as an advertisement in a number of newspapers. The gist of that letter was a suggestion that Congressional investigative procedure be overhauled so as to make secure the rights of individual citizens, protect them against defamation and smearing, and give them an adequate opportunity to be heard. [R. 453-7.]

There were also a number of press or radio statements issued by Paul V. McNutt, counsel for the Motion Picture Association at the hearing. In one of them Mr. McNutt commented, as of the close of the session for October 21, 1947, to the effect that the industry insisted there was no Communistic propaganda in its pictures, that the hearings had demonstrated this so far, and that as a lawyer he would advise the industry to avoid concerted action to compile a blacklist of Communist writers and other studio employees as such action would not be in accord with an announced policy of Congress or rulings of the Supreme Court. [R. 459-60.]

Another of these statements was a radio address in which Mr. McNutt dwelt on the application of the principle of free-speech in its relation to the Congressional investigation and repeated the industry's claim that its motion pictures contained no subversive propaganda. [R. 462-3.] Again, in a press statement, Mr. McNutt declared that he was shocked to see the violence done to the principle of free speech during the Committee's session of October 23, 1947, that it was apparent that the purpose of the Committee was to dictate and control the content of motion pictures, and that the industry would continue to fight for a free screen. Another statement along the same lines was issued a few days later. [R. 463-4.]

There was also testimony at the Washington hearing by Mr. Johnston which plaintiff heard, in which Mr. Johnston told of suggesting, in June, 1947, a program for the Motion Picture Association part of which was the denial of employment to known Communists, but which was not adopted. One of the reasons for not adopting this part of the program was the advice of counsel that to join together to refuse to hire someone would be a potential conspiracy.[18] [R. 809-12.]

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[18]When the statement of policy was adopted in New York on November 25, 1947, it was with the legal advice and concurrence of former Justice James F. Byrnes and other counsel. [R. 787-8. 356-7.]

C. The Trial Court's Rulings and the Special Verdict, Findings and Judgment.

1. A special verdict in the form of four questions was submitted to the jury. The questions, together with the answers given by the jury, were as follows [R. 163-4]:

> "Question 1: Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, bring himself or tend to bring himself into public hatred, contempt, scorn or ridicule? (Answer 'yes' or 'no.')
>
> Answer: No.
>
> Question 2: Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, tend to shock, insult or offend the community? (Answer 'yes' or 'no.')
>
> Answer: No.
>
> Question 3: Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities in connection with the hearing held by said Committee, prejudice the defendant Loew's Incorporated as his employer or the motion picture industry generally? (Answer 'yes' or 'no.')
>
> Answer: No.
>
> Question 4: Did the defendant Loew's Incorporated by its conduct towards the plaintiff, subsequent

to the hearing, waive the right to take action against him by suspending him? (Answer 'yes' or 'no.')

Answer: Yes."[19]

Although a general verdict was not submitted to the jury, they were elaborately charged upon the substantive law thought to be applicable to the case.[20] [R. 133-61, 891-920.] The respects in which that charge is claimed to be erroneous are sufficiently set out in the Specification of Er-

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[19]This question was submitted, at plaintiff's request, and over defendant's objection that it was outside the issues. [R. 946.] It should also be noted that while it confines the question of waiver to defendant's conduct *subsequent* to the hearing, the charge expressly permitted consideration of evidence of defendant's conduct *before,* as well as after, the hearing. [Point I, C, 4, *infra,* pp. 85-8.] On the other hand, comparison of the issues, as defined in the pretrial order [*supra,* pp. 8-9], with the first three questions submitted, at defendant's request but in modified form, will show a substantial narrowing of the controversy as a result of that modification—the question of plaintiff's conduct, *in concert with others* having been eliminated. [See, Point II, A, *Second, infra,* p. 112.]

[20]Ordinarily, when only a special verdict is to be returned, it is not necessary to charge generally upon the law of the case. Rather the charge is confined to those directions needed to explain the matter submitted to the jury and enable them to make their findings, as distinguished from instructions on the substantive law usually necessary to the rendition of a general verdict. [F. R. C. P., rule 49a; *Lipscomb,* Special Verdicts Under The Federal Rule, 25 Washington Univ. L. Q. 185, 3 F. R. Serv. 747, 752-3; *Nordbye, D. J.,* Use of Special Verdicts, 2 F. R. D. 138, 139-41.] Conforming to this practice, defendant confined its requests to instructions relating to the manner of deliberation, the nature and effect of inferences and presumptions, facts admitted or judicially noticed and the like. [R. 124-30.] Plaintiff, however, requested a large number of instructions on the substantive law, many of which were given as requested or in substance. [R. 101-24.]

rors. [*Infra,* pp. 45-67; see, also, Point I, *infra,* pp. 68-109.]

2. The trial court adopted the jury's verdict and in addition made extensive findings of its own. [R. 169-79.] Upon the findings and conclusions thus drawn a judgment was entered. It declared that defendant had no right to suspend plaintiff's employment or compensation; that the stated grounds of suspension were not valid and that plaintiff had not violated the public relations clause of the employment contract. [R. 187-8.] Plaintiff was awarded judgment in the sum of $76,500 for compensation to December 30, 1948. Defendant was ordered to reinstate plaintiff to his employment or, upon failure to comply with that direction, to pay plaintiff the sum of $1350 per week from December 30, 1948 to November 15, 1949, for each week plaintiff continues to be ready, willing and able to perform his services. Defendant was also ordered to take appropriate action to set the suspension notice aside, and was enjoined from continuing it in effect. The court reserved jurisdiction for the purpose of enforcing the judgment so rendered. [R. 188-92.]

3. Various of the trial court's rulings on the admission and exclusion of evidence are claimed here to be erroneous. The specific rulings in this connection are adequately set out in the Specifications of Errors, *infra,* pp. 39-45, and so are not repeated at this point. [See, also, Point II, *infra,* pp. 110-21.]

D. The Disqualification of the Trial Judge.

On March 22, 1948—some eight months before the trial and within six days of the time when defendant received the information upon which its application was based—the defendant filed an affidavit and application for transfer of the cause to another District Judge upon the ground that the Honorable Leon R. Yankwich, before whom it was pending, was disqualified for personal bias and prejudice against the defendant. [R. 43-6.] That application was grounded on the allegation that Judge Yankwich, before the cause had been commenced but after the events which gave rise to the litigation had occurred, expressed the opinion, at a social gathering, "that there was no legal justification for the suspension or discharge of any of the persons whose conduct before the Committee resulted in their indictment; that he hoped that none of the cases arising out of such suspensions or discharges came before him but if they did he would have no alternative but to render judgment for the plaintiffs in such actions; and that if he were the attorney for such plaintiffs he could recover judgment in their favor for millions of dollars. . . ." [R. 44.]

Judge Yankwich, recognizing that under the Federal practice these allegations had to be taken as true, nevertheless filed counter-affidavits in which the making of the statements attributed to him was controverted. [R. 58, 68-76.] He then denied the application for transfer upon grounds set forth in a written opinion, and continued thereafter to preside over the cause. [R. 47-76, 77, 168-9.]

SPECIFICATION OF ERRORS.

1. The trial court erred in refusing to admit evidence offered by defendant showing the conduct and testimony of each of the unfriendly witnesses before the Congressional Committee, including the fact that each had refused there to answer a question as to whether they were or ever had been members of the Communist Party; which evidence was objected to by plaintiff and by the Court on its own motion on the following grounds [R. 651, 721, 731, 828]:

> "Q. Did you know, before Mr. Lawson took the stand, that Mr. Lawson proposed to read, if he were permitted to do so, a statement he had prepared?
>
> Mr. Katz: We object to that on the ground it is immatarial.
>
> * * * * * * * *
>
> Mr. Selvin: At this time, may it please the court, we should like to offer in evidence a motion picture showing, substantially in the same form as did the picture of Mr. Cole shown yesterday, the testimony and conduct before the Un-American Activities Committee of all of the 10 men who have heretofore been referred to in evidence. I understand that it is agreed that the proposed motion picture correctly reflects the proceeding but that substantive objections otherwise are reserved.
>
> Mr. Katz: To which, on behalf of the plaintiff Lester Cole, we interpose the objection on the ground that it is immaterial. This is an action involving Mr. Lester Cole's contract with his employer and in the notice of suspension it is Mr. Cole's acts and conduct for which his contract is sought to be suspended. We object to that on that ground, in the light of the contract itself, the notice of suspension that was sent, and the fact of the statement of Mr. Cole, and the

picture of Mr. Cole before that committee has already been exhibited. There is no materiality at this time, at least at this stage of the proceedings, what nine or 10 or any number of other persons may or may not have said or done before the committee.

* * * * * * * *

Mr. Selvin: Now, we will at this time renew our offer with respect to that film.

The Court: It will be rejected. I know what you are trying to do. You will have to prove it. You will have to bring Mr. Schenck here and prove that he actually saw the picture and what he acted on.

* * * * * * * *

Mr. Selvin: You would not allow the testimony of the conduct of the ten?

The Court: Not other than what is already in.

Mr. Walker: Your Honor, you would not allow the showing of the pictures?

The Court: I wouldn't allow the showing of the pictures of the other nine men.

Mr. Selvin: Or the reading of the transcript?

The Court: No." [Point II, A, *infra,* pp. 110-12.]

2. The trial court erred in refusing to admit evidence offered by defendant as to the observations of qualified witnesses with respect to the public attitude toward Communism, the Communist Party and the conduct of plaintiff before the Congressional Committee, to which evidence plaintiff objected on the following grounds [R. 829-44, 357-8]:

"Mr. Katz: To which we object on the ground it is incompetent, irrelevant and immaterial. If this producer wanted to discharge Mr. Cole because it believed it could prove that he advocated the overthrow of the government by force and violence or that he was a Communist, it should have done so

and joined the issue. Knowing that it could not establish any such proof, it gave a notice in which it resorted completely to the terms of the morals clause. The morals clause refers specifically to an act of Mr. Cole before the House Committee on Un-American Activities and his acts and conduct there. That was the limit of the notice of suspension. And we object on the ground that it is an attempt to bring into this case extraneous matters.

* * * * * * * *

Q. (By Mr. Walker): Prior to the time, Mr. Mayer, that you joined in as you have indicated the adoption of this statement of policy which was formed at the meeting at the Waldorf-Astoria in October—in November of 1947, what had been your observation of public opinion with reference to the hearings in Washington and particularly that portion of the hearings in which the questions were asked by the Committee and not answered by certain of the parties, including Mr. Cole?

Mr. Katz: We object to that question upon the ground that no proper foundation has been laid. It is incompetent and immaterial.

The Court: I don't think it is proper examination as to the matter before the court at the present time. . . ." [Point II, B, *First, infra,* pp. 113-15.]

3. The trial court erred in excluding from evidence Defendant's Exhibits G and H, consisting of a compilation of editorials from newspapers throughout the country commenting upon the Committee investigation and unfavorably upon the conduct of plaintiff and his confederates thereat, as follows [R. 782-4, 823]:

"The Court: . . . I do not think, in view of the long arguments that we have had, it will take any additional extensive argument, and I say now that I

am satisfied, more than ever . . . that the editorials cannot be shown." [Point II, B, *Second, infra,* p. 115.]

4. The trial court erred in refusing to admit evidence offered by defendant that the Communist Party of America advocates the overthrow of our present form of government by force and violence and is the agent of a foreign power, to which evidence plaintiff objected on the following grounds [R. 829-44]:

"Mr. Katz: To which we object on the ground it is incompetent, irrelevant and immaterial. If this producer wanted to discharge Mr. Cole because it believed it could prove that he advocated the overthrow of the government by force and violence or that he was a Communist, it should have done so and joined the issue. Knowing that it could not establish any such proof, it gave a notice in which it resorted completely to the terms of the morals clause. The morals clause refers specifically to an act of Mr. Cole before the House Committee on Un-American Activities and his acts and conduct there. That was the limit of the notice of suspension. And we object on the ground that it is an attempt to bring into this case extraneous matters." [Point II, C, *infra,* pp. 116-17.]

5. The trial court erred in refusing to permit defendant to cross-examine plaintiff as to whether he was a member of the Communist Party and whether that fact was not his real reason for refusing so to testify before the Congressional Committee, to which line of inquiry plaintiff objected on the following grounds [R. 595-603, 613-17, 674-77]:

"Mr. Katz: To which we object upon the ground it is irrelevant and immaterial for the reason, among others, that the notice of suspension itself assigns as

a cause for the suspension certain conduct before the House Committee, and an asserted refusal to answer questions does not assert that Mr. Cole was or was not a member of the Communist Party; upon the further ground that the record already shows that, in so far as this employer is concerned, out of the lips of the principal officers of this employer, not contradicted, they have declared that, in so far as employment at Loew's was concerned, it did not make any difference to them that Mr. Cole was or was not a Communist or was or was not being charged with being a Communist; and upon the final ground that, in the light of the fact that the suspension does not specify as a ground therefor the claim that Mr. Cole was a Communist or was not a Communist, any inquiry into that area is not germane to any issue which the court or the jury must ultimately pass upon.

* * * * * * * *

The Court: The objection is sustained.

Mr. Walker: Wasn't your real reason for failing to state, in response to the referred to question of the Committee, whether you were a Communist, because of your unwillingness to admit that you were a Communist rather than for the reasons that you have heretofore assigned for your conduct?

Mr. Katz: We object to that question on the ground it is immaterial, argumentative and incompetent.

The Court: The objection is sustained. . . ." [Point II, D, *infra,* p. 118.]

6. The trial court erred in limiting defendant's cross-examination of plaintiff so as to preclude defendant from inquiring into plaintiff's knowledge and awareness, before he testified at the Committee hearing, of the state of public feeling toward Communism and the Communist Party and

its members, to which line of inquiry plaintiff objected on the following grounds [R. 590-619]:

"Mr. Katz: Just a moment. We are going to object to that on the ground it is incompetent, irrelevant and immaterial.

* * * * * * * *

Mr. Katz: Our further grounds would be that they are vague and that they call for a conclusion of the witness as well as being immaterial and incompetent." [Point II, E, *infra,* p. 119.]

7. The trial court erred in overruling the objections of defendant to, and admitting evidence offered by plaintiff of, the facts that plaintiff's salary had been paid, and motion pictures on which he had worked had been distributed, after the Congressional Committee hearing, which evidence was objected to by defendant on the following grounds [R. 694-6, 863-7]:

"Mr. Selvin: We object to that upon the ground it is immaterial and not proper redirect and not within the issues.

* * * * * * * *

Mr. Selvin: And upon the further ground that no proper foundation has been laid in this: that the figures by themselves offer no standard or criterion to determine whether anybody did or did not see this picture because of the conduct in question. They merely reflect gross showings.

* * * * * * * *

"Mr. Selvin: Yes, but the mere fact that the picture was exhibited would have no tendency at all to show any waiver, because among other reasons under the contract, even if the contract were wholly terminated for cause, the right to continue showing pictures, based upon Mr. Cole's work, would continue,

because Mr. Cole's work was absolutely acquired under the contract. So that the continuation of the pictures is no evidence of any adoption or confirmation of the contract or of any relaxation of the contract or of any intention, with knowledge of facts, entitling one to terminate it altogether. Now, the question of exhibition of the picture has nothing to do with the termination or non-termination of the employment." [Point II, F, *infra,* pp. 120-21.]

8. The trial court erred in charging the jury as follows [R. 897, 901-4]:

"II.

THE NATURE OF THE ACTION AND THE CONTRACT.

* * * * * * * *

"In answering the special interrogatories which will be submitted to you, you must determine as to each whether the conduct of the plaintiff in the particular instance referred to, namely, his appearance before the Congressional Committee, was of such character that you, as jurors, can say that, under our American standards of right conduct, it did shock or tend to shock and offend the community and/or brought the plaintiff, or tends to bring the plaintiff, into public scorn and contempt as herein defined.

"The verb 'to prejudice' also appears in the clause of the contract by which the plaintiff agrees, among other things, not to do or commit any act or thing that will 'prejudice the producer or the motion picture, theatrical or radio industry in general.'

"The verb 'to prejudice' is defined as follows: 'To injure or damage by some judgment or action; to cause injury to; hence, generally, to hurt; damage, injure, impair, as to prejudice.'

"In respect to those words also, you must determine whether the conduct of the plaintiff was such that you, as jurors, can say that, under our American standards of right conduct, which are accepted by the community of which you are a part, it was conduct which would injure or damage the defendant. And, in determining whether it would have such effect, you must consider whether the conduct would be considered an attack or reflection on the reputation of the defendant in its method of conducting its affairs through the employment as a writer of a person who acts as the plaintiff did under the circumstances. Even lawful actions may shock or offend certain persons and subject the persons performing these acts to scorn and contempt. To illustrate: If a man is sued for money owed, he may, even though he has not paid the money, defend the action on the ground that it was outlawed.

"I have made an addition, so I will reread that paragraph. Strike out what I have said beginning with 'Even lawful actions.'

"Even lawful actions may shock or offend certain persons and subject the persons performing these acts to scorn and contempt. To illustrate: If a man is sued for money owed, he may, even though he has not paid the money, defend the action on the ground that it was outlawed, that is, that the suit was not brought within a certain period of time prescribed by law. A person holding high views of business or commercial ethics might be critical of one who makes such a defense. But it could not be said that the community as a whole or a good portion of it would be shocked or offended by the fact or that it would subject the person making such defense permitted by law to public scorn or contempt.

"Unless forbidden by State or Federal law, or by the courts as against public policy, an employer might, as a condition of employment, require, in a written contract, that an employee do not perform, during the course of the employment, certain acts which are not in themselves illegal. In such event, the employer might, if the employee violated the condition, during the period and time of employment, consider it a breach and take whatever steps he may be allowed under the contract.

"And in a lawsuit arising from such a controversy, the only factual situation involved would be whether the designated prohibited act was actually committed. But when, as here, the prohibited conduct is not named specifically in the contract of employment, but is defined as conduct having a certain effect, then the jury is called upon to determine, as you are called upon here, as questions of fact:

"1. Whether the conduct was of the character forbidden by the contract; and

"2. Whether the employee was guilty of such conduct.

"You are instructed that the burden is on the defendant to prove by a preponderance of the evidence sufficient justification, in accordance with the instructions of the court, for suspending Mr. Cole. This means that before you can find that the defendant was so justified or that plaintiff conducted himself in a manner contrary to the morals clause of the contract, you must be satisfied by a preponderance of the evidence that every fact essential to show such justification is true.

"Therefore, unless such justification is established by a preponderance of the evidence you must find that the plaintiff did not conduct himself in such a

manner as to bring himself into public scorn, hatred, contempt or ridicule, or that his conduct had any of the other effects in the clause.

"In considering whether Lester Cole's conduct had such effect, you are not to speculate or to guess. If you are not satisfied by a preponderance of the evidence that such was the fact, you are to find that his conduct did not have any of the effects stated in the clause.

"In determining whether the conduct of Lester Cole had such effect, or if it had any, you are to consider only the period between October 30, 1947, and December 2, 1947.

"An employer cannot penalize an employee simply by claiming a violation of a contract by the employee. In order to justify a claim of violation and a suspension or other penalty allowed by the contract, the employer must show that the employee's act charged as violation was done or committed by the employee and that it was done wilfully and intentionally. Thus, in order to find that the plaintiff so conducted himself as to bring himself into public scorn, hatred, contempt or ridicule, or to shock the community or prejudice the defendant, you must find from all the evidence, and by a preponderance of the evidence, that his conduct, which it is charged had that effect, was wilful and intentional and actually had that effect."

to which instruction the defendant objected on the following grounds [R. 924-30]:

"Mr. Selvin: Referring, first, your Honor, to the subdivision of the instructions which was numbered II, that is, the nature of the action and the contract, the instruction in that subdivision which told the jury, in effect, that they must be able to say that, under our

American standards of right conduct, the plaintiff's conduct and his appearance before the Committee must be shown to shock, offend and insult the public and to bring himself into public scorn, contempt and so forth, our objection to that particular instruction is that it requires the defendant to show that the conduct had the effect and not merely, as the contract provides, that it had the tendency to produce that effect.

* * * * * * * *

"Mr. Selvin: To go on to the next point, still in Subdivision II of the charge, where your Honor was discussing the burden of the defendant to prove jurisdiction [justification], we object to that instruction because in the form given it leaves to the jury not a question of whether the facts claimed to constitute the justification occurred but whether or not there was justification as a matter of law.

* * * * * * * *

"Mr. Selvin: In the immediate following matter on which your Honor touched, to the effect the jury should not speculate as to whether Cole's conduct had the effect claimed for it but must determine it from the evidence, the instruction in the form given we contend carries the implication that what they must determine is whether it actually had that effect and, therefore, eliminated the proposition that it was sufficient if it tended to have that effect. I am referring, of course, to the question of whether it shocked or offended the community." [Point I, E, *infra,* pp. 101-5.]

9. The trial court erred in charging the jury as follows [R. 905-7]:

"III.

THE LAW OF CONTRACTS BETWEEN MASTER AND SERVANT OR EMPLOYER AND EMPLOYEE.

* * * * * * * *

"An employer may consider a contract of employment breached by the employee when the employee fails to perform his duty under it or breaches the express or implied conditions in the contract, even though injury does not result to the employer in consequence of the employee's breach. But the reason given for the action must be true, from the standpoint of the employer acting in good faith.

"And where the contract specifies the grounds for its termination or suspension, and written notice of such ground is provided for, the employer, in order to justify his action, must show that the ground given in the notice actually existed. If he does not do so, by a preponderance of the evidence, he cannot justify his action upon other grounds named in the contract which, although true, were not stated in the notice.

"In performing his duties under the contract, the plaintiff was required to comply substantially with its terms.

"To apply these rules to the facts here: The plaintiff Lester Cole was employed by the defendant, Loew's, Incorporated, under a written contract of employment; that contract ran until November 15, 1949, with certain options. Where, as here, an employer suspends an employee during the term of his contract, the law requires that the employer justify that suspension by a preponderance of the evidence. In this case, the defendant having notified the plaintiff that it sus-

pended the plaintiff upon the ground that he so conducted himself at this hearing and in connection with it as to bring himself into public scorn, hatred, contempt or ridicule, it is necessary for the defendant to prove by a preponderance of the evidence that the plaintiff Lester Cole personally so conducted himself that he was held in public scorn, hatred, contempt or ridicule, or that his conduct shocked or offended the community or prejudiced the defendant or the industry in general."

to which instruction the defendant objected on the following grounds [R. 943-4]:

"Mr. Selvin: The next one I propose to take up in the charge, which I think follows the one just discussed, is where you refer to the fact that where the contract specifies or requires a written notice—

The Court: That is right.

Mr. Selvin: —the justification must be confined to the grounds specified. Our objection, in the first place, is that if there is in fact a justification, the employer's good or bad faith is immaterial, whereas, this instruction requires good faith.

Another objection is that the instruction is inapplicable to the facts of this case because the contract here does not require a written notice of the grounds of suspension.

* * * * * * * *

Mr. Selvin: And the general objection to it is that we take the position that we can justify on any of the grounds which actually existed at the time whether known to us or otherwise.

The Court: You can argue that to someone else, because I am satisfied.

Mr. Selvin: Then, in that same subdivision where your Honor states that the application of those rules to the facts require certain findings—

The Court: Yes.

Mr. Selvin: —our objection to that portion of the charge is that again the tendency of the acts to have the effect is eliminated and it is their actual effect which is—

The Court: No. I am sorry. You misconceived that and I am not surprised, . . ." [Point I, E, *infra,* pp. 101-5.]

10. The trial court erred in charging the jury as follows [R. 907-10]:

"IV.

THE ACTS OF THE EMPLOYER CONSIDERED AS WAIVER.

"An employee has a right to rely on statements of the officers and representatives of a corporation by which he is employed in determining whether a certain course of conduct would violate his obligations as an employee.

"If an employer by his words and acts leads an employee to believe that certain conduct by the employee will not be considered a violation of his employment obligations, and the employee, in good faith, acts in such belief, then the employer may not thereafter be allowed to treat such conduct as a breach of the employee's obligations.

"If Mr. Cole, in good faith, in this case did come to the conclusion, from the actions and the statements of the executives of the defendant, Mr. Mayer and Mr. Mannix, and you so find as a fact, that Mr. Cole could conduct himself as he thought proper before the congressional committee, assuming that you find such actions took place and such statements were made,

you are instructed that Cole had the right to use his best judgment as to what his conduct before the Committee should be.

"Or, to put it differently and more explicitly:

"If you find that the defendant's executives, Mr. Mayer and Mr. Mannix, performed certain acts and made certain statements, and by such actions and such statements, before the hearings, led the plaintiff Lester Cole to believe that they were not concerned about charges that he was a Communist, or that he was a Communist—and Mr. Cole, in good faith, relied on such statements and actions in deciding upon a line of conduct before the Committee—but that the defendant's executives afterwards changed their minds, without notifying Cole, before he testified before the House Committee, and gave them—just a minute. Strike out 'and gave them'.

"I made some changes, so I will start this over again:

"Or, to put it differently and more explicitly: If you find that the defendant's executives, Mr. Mayer and Mr. Mannix, performed certain acts and made certain statements, and by such actions and such statements, before the hearings, led the plaintiff Lester Cole to believe that they were not concerned about charges that he was a Communist, or that he was a Communist, and gave him no specific instructions as to how to conduct himself in the matter—and Cole, in good faith, relied on such statements and actions in deciding upon a line of conduct before the Committee —but that the defendant's executives afterwards changed their minds, without notifying Cole, before he testified before the House Committee, and without giving him any specific instructions as to how to act, then I instruct you that Cole had the right to pursue the conduct he had decided upon on the basis of the

prior acts and statements referred to, if you find them to be true and to have existed, without regard to any later claim or possible claim by his employer that because of his conduct the public might be led to believe that he was a Communist.

"In this case, the plaintiff Lester Cole agreed in his contract with Loew's, Incorporated, that he would comply with the provisions of his contract to the full limit of his ability or as instructed.

"If you find that the defendant Loew's knew that Lester Cole had been subpoenaed to appear before the House Committee on Un-American Activities, then I instruct you that if the defendant desired that plaintiff Lester Cole conduct himself before the Committee in a certain manner, the defendant Loew's had the right to give reasonable and specific instructions to Lester Cole.

"I will read the last paragraph over again, as I have modified it—I will read the whole instruction over again.

"In this case, the plaintiff Lester Cole agreed in his contract with Loew's, Incorporated, that he would comply with the provisions of his contract to the full limit of his ability or as instructed.

"If you find that the defendant Loew's knew that Lester Cole had been subpoenaed to appear before the House Committee on Un-American Activities, then I instruct you that if the defendant Loew's desired that plaintiff Lester Cole conduct himself before the Committee in a certain manner, the defendant Loew's had a right to give reasonable and specific instructions to Lester Cole and that it was his duty to follow them, if they were reasonable, as the contract provides.

"You are instructed that even if an employer has the right to suspend an employee under a contract, he may, by his words or conduct, and without reference to any act or conduct of the party affected thereby, waive this right. A waiver is such conduct of the employer as shows his election to forego the right to suspend, which he might otherwise have taken or insisted upon under the contract. Once such right is waived by the employer, it is gone, so far as the particular conduct is concerned, and cannot be claimed by him, except for some other or different violation by the employee.

"To put it into a brief sentence: An employer knowing of an employee's conduct which might warrant suspension or termination of employment may not continue employing him thereafter and at a later date treat the employee's conduct as a breach of his obligations.

"So, here, if you find that when Cole came back from Washington, Loew's knew of Cole's statements and conduct before the House Committee in Washington in connection with the particular hearings, but nevertheless, put him back to work, and accepted his services with the intention of accepting Cole as its employee under the employment contract, then I instruct you that Loew's waived the right to rely upon such conduct in taking action against Cole."

to which instruction the defendant objected on the following grounds [R. 945-50]:

"Mr. Selvin: Subdivision IV, the acts of the employer considered as waiver. There are certain general objections which we have to apply to the entire subdivision, first, that it permits the jury to consider, on the question of waiver, conduct or alleged conduct of the defendant occurring prior to the hearing.

* * * * * * * *

"Mr. Selvin: In so far as conduct prior to the hearing is instructed upon in this subdivision, it, in our opinion, is relevant, if at all, only on the theory of estoppel and the jury had not been told the elements of the law of estoppel.

* * * * * * * *

"Mr. Selvin: Our third point is that neither estoppel nor waiver was pleaded or made an issue in the case.

* * * * * * * *

"Mr. Selvin: Our fourth objection is that, in so far as waiver is concerned, the jury has not been instructed that waiver is a question of intention and has not been told that, before one can be held to waive it must appear that, with knowledge of his right, he took certain conduct and intended to waive that right.

* * * * * * * *

"Mr. Selvin: Still on Subdivision IV, we object upon the ground that the instruction singles out for specific mention the testimony of Mr. Mayer and Mr. Mayer's and Mr. Mannix' statements to Mr. Cole before he left for Washington, leaving unmentioned the statements of Mr. Mayer and of Mr. Johnston in a similar connection, which it was testified he heard before he took the stand. Again, on Subdivision IV—

* * * * * * * *

"Mr. Selvin: We also object to that portion of the charge upon the ground that it makes the determining, or one of the determining, factors the question of whether Mr. Cole, in good faith, assumed that he was free to act and leaves out of consideration the question of whether he was justified in so

assuming on the basis of what was told him or he heard.

* * * * * * * *

"Mr. Selvin: Then, in this same subdivision, where your Honor has charged the jury that the defendant knew Mr. Cole was subpoenaed, and if it desired any particular line of conduct on his part, it had the right to instruct him, we object upon the ground, first, that the instruction as given carries the implication that, if they did not give him any instructions or directions, they waived any right to complain of his conduct afterwards—

* * * * * * * *

"Mr. Selvin: And, second, in respect to that same instruction, upon the ground that, in our opinion, an employer does not have the right to instruct an employee as to how he shall testify before a Congressional Committee.

* * * * * * * *

"Mr. Selvin: Then the concluding instruction in that subdivision we object to upon the ground it is not only a formula instruction which eliminates certain essential elements necessary to reach the result but it is, in view of the undisputed facts in the case, in effect, an instruction to return a verdict in the plaintiff's favor and particularly in that it eliminates from the consideration of the jury the proposition that the mere fact that the employee may be retained for a period of time after the alleged violation occurred does not in and of itself necessarily constitute a waiver, and because it further eliminates from the consideration of the jury in that regard the proposition that the conduct here complained of is a persistent conduct and continued, as we contend, up to and be-

yond the time the employer took the action complained of by the plaintiff." [Point I, C, *infra,* pp. 78-94.]

11. The trial court erred in charging the jury as follows [R. 911-13]:

"V.

THE RIGHTS OF WITNESSES BEFORE COMMITTEES.

* * * * * * * *

"In exercising the right of inquiry, a Congressional Committee may subpoena witnesses and ask them questions relevant to the inquiry. However, a witness examined before the Committee also has rights. He may decline to answer certain questions in order to secure from the courts a final determination of the right of the Committee to ask the particular question. When he does so, he paves the way for contempt proceedings in the courts, and not before the committee, where, that is, in the courts, a final decision as to the power of the committee in the particular respect can be obtained.

"When a question is asked of a witness before a committee, he may give either a direct or an irresponsive answer. If the question is of such character as to require an explicit answer, he may be directed to give such answer. But he cannot be required to answer in a specific manner and without being given an opportunity to explain his answer. Nor can he be denied the right to amplify it. And there is nothing wrong if the answer which the witness gives goes beyond the question, or is what we call in law non-responsive.

"A non-responsive answer, if it includes irrelevant matter, may be stricken. If it contains relevant facts, they are admissible, notwithstanding the fact

they were not specifically asked for or called for by the particular question.

"When a witness is called before a Congressional Committee he has a right to invoke the protection of the Constitution and of the laws of the United States, and to that end he has the legal right guaranteed to every citizen or legal resident of the United States to assert rights reserved by the Constitution and the law and to claim their privileges.

"In this respect, the Supreme Court has said:

" 'An official inquisition to compel disclosures of fact is not an end, but a means to an end; and the end must be of a legitimate one to justify the means. The citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer.

"And before a witness can be guilty of contempt of a legislative committee two conditions must occur:

1. The questions asked of the witness must be relevant to the purpose of the inquiry, that is, it must be required in a matter into which the committee has the jurisdiction to inquire, and

"2. The witness must actually refuse to answer the relevant question.

"Or, conversely put:

"A witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry.

"Whether he is right or wrong, and even though he may be subjected to penalties if he is wrong, every citizen has the right to have determined by the courts questions as to his Constitutional or other legal rights.

This is one of the privileges and incidences of American citizenship.

"I will reread the first sentence, because I have modified the last sentence:

"Whether he is right or wrong, and even though he may be subjected to penalties if he is wrong, every citizen has the right to have determined by the courts questions as to his Constitutional or other legal rights. This is one of the privileges and incidences of American citizenship.

"And even the alien in our midst, if he be a legal resident, has certain rights and privileges which he may assert and which it is the duty of a legislative committee to respect and of the courts to protect."

to which instruction defendant objected on the following grounds [R. 951-2]:

"Mr. Selvin: The objection which extends to all of Subdivision V is that it is irrelevant to the issues of fact to be submitted to the jury. The question for the jury to determine is whether or not the conduct complained of occurred, and in the form it is now to be presented, whether or not, if it occurred, the defendant has waived its rights in respect to that. The question of what the plaintiff's rights before the Committee might have been are not involved in the question of whether the conduct had the effect complained of and, if so, whether it has been waived.

"We object further upon the ground that, whatever may be the technical description of the right or power of a person to precipitate a legal test by refusing to answer a question before a committee, the fact [is] that a refusal to answer a pertinent question is a criminal violation of the law of the United States and is not included in the discussion of the

rights of witnesses and it should be included if the subject is to be fully stated at all.

* * * * * * * *

"Mr. Selvin: We object further to that subdivision of the charge on the ground that as given it, in effect, submits to this jury the legal question as to whether or not what Mr. Cole did was a contempt of Congress as distinguished from the question as to whether or not his conduct, whether lawful or unlawful, had the effects contended for it." [Point I, D, *infra,* pp. 95-100.]

12. The trial court erred in charging the jury as follows [R. 915-18]:

"VII.

THE QUESTION OF COMMUNISM.

"In view of the fact that the conduct of the plaintiff which is made the ground of suspension involved his failure to answer concerning his membership in a professional union and in the Communist Party, the court will give you some specific instructions as to the bearing of the question on the problem before you.

"You are instructed that in California it is libelous to call a person a Communist. This for the reason that such a charge would expose a person to the hatred, contempt and ridicule of many persons.

"At the same time, I instruct you that in California it is lawful for a person to be a member of the Communist Party, and to register with the Registrar of Voters of a county as a member of such party. In California, the Communist Party is entitled to participate in elections, including primary elections, and to nominate candidates. And, while, under California law, any party which carries on or

advocates the overthrow of the government by unlawful means or which carries on or advocates a program of sabotage may not participate in primary elections, the courts of California have ruled that the courts do not take judicial notice of the fact that the Communist Party advocates the overthrow of the government by force or violence, and they have also ruled that a registered Communist is not guilty of a violation of the State law by the mere fact of membership in the Communist Party. You are to bear these facts in mind in judging whether the conduct of the plaintiff was as charged by the defendant. And, in determining this matter, you are to bear in mind the following facts and additional instructions.

"I have stated that in California an accusation of Communism against a person is libelous. This is so because, under California law, every false and unprivileged publication which exposes a person to hatred, contempt, ridicule or obloquy or causes him to be shunned or avoided, or which has a tendency to injure him in his occupations, is libelous *per se*.

"The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit.

"In this matter, the law recognizes that men's reputations are 'tender things,' and presumes that every person has a good reputation.

"For this reason, the law does not require one who has been libelled to prove its falsity. On the contrary, falsity is presumed if the publication is unprivileged, that is, not uttered in a judicial or legislative proceeding or other proceedings protected by law, and is of a character to affect his reputation, such as a charge of Communism is.

"The person who libels another has the burden of proving that the charge is true. He who repeats a libelous statement, if he wishes to justify it, must prove not that another has made the statement, but that the statement is true.

"These principles should be borne in mind by you in considering the testimony in this case in which reference was made as to certain accusations made against the plaintiff in certain publications and before the Committee which were repeated and discussed in the presence of some of the defendant's representatives. You were admonished at the time when these accusations were repeated here and I admonish you again now that they are to be considered only as having been made and that no one has proved in this lawsuit that these accusations are true. Indeed, the truth of these accusations is not an issue in the case. And the reason, as already stated, is that the defendant has not charged the plaintiff is a Communist or a member of the Communist Party and that the notice of suspension involved here does not set forth as a ground of suspension the fact, if it be a fact, that the plaintiff is or ever has been or was at the time of the notice, a Communist or a member of the Communist Party. As you have already been instructed, the defendant, having, in accordance with the contract of employment, specified in the notice the ground on which they relied for suspension, is bound by it. And the only ground of suspension set forth in the notice is the conduct of the plaintiff before the Un-American Activities Committee of the Congress in connection with certain hearings and at the time specified of his appearance before that Committee. All the evidence on the part of both the plaintiff and the defendant has been directed to that conduct. And the question whether the plaintiff is

or is not, was or was not, a Communist, is not before you. All you have to determine is whether in not answering in the manner requested by the Committee, the question, among others, whether he was a Communist or a member of a trade organization, and whether his entire conduct before the Committee in connection with the hearings was of the type forbidden by what has been called the 'public relations' clause as bringing the plaintiff into public scorn and contempt, shocking and offending the community and prejudicing the defendant and the industry.

"And, in determining this matter, you are to consider all the evidence and reach your verdict without trying to speculate about the political affiliations of any of the witnesses or parties in this case."

to which instruction the defendant objected on the following grounds [R. 953-4]:

"Subdivision VII of the charge, the question of Communism—we object generally to so much of the charge as does any more than tell the jury that it is a fact, which the court will judicially notice, that there is a noticeable segment of the population of this country who look with scorn, contempt, hatred and ridicule, upon the Communist Party and its sympathizers. Beyond that, any instructions as to the law of libel, the burden of proof in libel cases, the question of privilege and libel, the burden upon the alleged defamer or any other person to prove the truth of the charge, are all matters completely extraneous to any issue in this case.

* * * * * * * *

"Mr. Selvin: We object to so much of that portion of the charge as discusses the legal position of the Communist Party in California, particularly in view of the exclusion of the evidence offered by the defendant to show that the Party does, in fact, ad-

vocate force and violence. And we object to the concluding portion of that subdivision of the charge which tells the jury that they should not speculate about the politics or political affiliations of any person involved on the ground that, in the manner given, it tends to eliminate from the consideration of the jury the question of what the effect upon the public was or tended to be in respect to their belief as to Mr. Cole's political affiliations." [Point I, A, B, *infra,* pp. 68-77.]

13. The trial court erred in refusing to give the following instruction requested by defendant [R. 101, 128-9]:

"Defendant's Requested Instruction No. 7:

"In addition to stipulated facts and facts which are the subject of direct or indirect evidence, certain facts are the subject of judicial notice. Such facts, that is, facts which are the subject of judicial notice, are conclusively deemed to be known by the Court and jury and are, therefore, deemed established in the case without any evidence of them. Among the facts judicially noticed is the fact that many average and respectable persons in this country look with scorn and contempt upon the Communist Party of America and upon its members and sympathizers."

to the refusal to give which defendant objected as follows [R. 922]:

"Mr. Selvin: Yes, we have. We will object to the refusal to give defendant's requested instruction No. 7." [Point I, F, *infra,* pp. 106-9.]

14. The trial court erred in submitting the following special verdict or question to the jury [R. 920, 961]:

"Question 4:

"Did the defendant Loew's, Incorporated, by its conduct towards the plaintiff, subsequent to the hearing, waive the right to take action against him by suspending him?

"(Answer 'Yes' or 'No'.)

"Answer: . . ."

to which submission the defendant objected on the following grounds [R. 879-86, 933]:

"Mr. Selvin: Our position on that, your Honor, is that if waiver is properly an issue of fact in this case (if it is), and if there is a conflict in the evidence in that regard, then, it is, of course, a matter that should be submitted to the jury. However, we take the position that there is no issue of waiver in this case whatever. The pleadings raise the issue of performance, not waiver of performance. And the rule is well settled, I think, that in a contract action where waiver of performance, rather than performance, is relied on, that fact must be pleaded.

* * * * * * * *

"Mr. Selvin: Well, as I say, our position is that the only issuable facts pleaded, whatever the form of the action, are (1) whether or not the plaintiff duly performed, and that anticipates our claim of non-performance by pleading that affirmatively; and (2) whether the statements in the statement are true or false. The questions to be presented to the jury, as they are formulated relate to that last question, because those are the issues as raised by the pleadings, but there has never been any issue of fact raised in this case with reference to waiver. The fact that facts come in relative to an issue unraised does not put the unpleaded issue into the case."

* * *

Mr. Selvin: Now, since your Honor is rewriting a Special verdict, I might properly call attention to our objection to question 4 at this time, so that if there is anything in them that your Honor desires to adopt, it won't require a further rewriting.

"The Court: No. I am satisfied that that question should be submitted. I worded that very carefully. I wrote it and rewrote it several times and I think the question should be submitted to the jury because it is an issue which I have covered by instructions, the question of waiver, it was argued to the jury, and it should go in as an alternative condition and I have worded it in such a manner that it can be answered yes or no, regardless of how the first three questions are answered.

"Mr. Selvin: Well, we have indicated heretofore our objections.

"The Court: Yes, you have indicated your objections to the problem. I think this is properly before the jury." [Point I, C, 1, *infra,* pp. 78-9.]

15. The trial court erred in denying and refusing to grant defendant's application, made on the ground of personal bias and prejudice of the District Judge, to have the cause transferred to another judge. [Point III, *infra,* pp. 122-6.]

SUMMARY OF THE ARGUMENT.

The section headings and subheadings of our argument have been prepared with the idea that when collected into an index or table of contents they will serve as an outline or summary of the argument. Accordingly, and in the interests of space, we incorporate, but do not repeat the index appearing at the commencement of this brief as our summary of the argument.

ARGUMENT.

I.

THE TRIAL COURT'S CHARGE TO THE JURY WAS PREJUDICIALLY ERRONEOUS.[21]

The rule in California is well settled—so well settled that it has several times been referred to as "elementary" [*L. A. Gas etc. Co. v. Amal. Oil Co.,* 168 Cal. 140, 143, 142 Pac. 46, 47-8; *Rathbun v. Security Mfg. Co.,* 82 Cal. App. 793, 796, 256 Pac. 296, 197]—that a party himself in default cannot enforce a contract even though the other party has subsequently followed the first offender's example and has also defaulted. [*Wood etc. Co. v. Seurich,* 5 Cal. App. 252, 253-5, 90 Pac. 51, 52; *Towney v. People's Ice Co.,* 66 Cal. 233, 234, 5 Pac. 158, 159; *Dunn v. Daly,* 78 Cal. 640, 644-5, 21 Pac. 377, 378-9; *Ross v. Tabor,* 53 Cal. App. 605, 612, 200 Pac. 971, 974; *Kulawitz v. Pac. etc. Paper Co.,* 25 Cal. 2d 664, 669, 155 P. 2d 24, 27; *Karales v. L. A. Creamery Co.,* 36 Cal. App. 171, 172-3, 171 Pac. 821; *Calif. Sugar etc. Agency v. Penoyar,* 167 Cal. 274, 280-1, 139 Pac. 671, 674.]

Another statement of the same principle is, that before a plaintiff may recover in contract he must show

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[21]In the following discussion of the errors claimed by us to inhere in the trial court's charge to the jury, we do not repeat the objections to the charge which were made below. These are fully set out in the relevant Specification of Error, *supra,* pp. 45-67. No point is raised here which was not the subject of an appropriate objection in the District Court.

that he has performed all the conditions and agreements of the contract on his part to be performed; so that if he fails to make that showing or it appears affirmatively that he has not so performed, the judgment must go against him. [*L. A. Gas etc. Co. v. Amal. Oil Co.,* 156 Cal. 776, 778, 106 Pac. 55, 57; *Cameron v. Burnham,* 146 Cal. 580, 584, 80 Pac. 929, 930; *Bristol v. Hershey,* 7 Cal. App. 738, 744, 95 Pac. 1040, 1042; *Minaker v. Calif. Canneries Co.,* 138 Cal. 238, 241-2, 71 Pac. 110, 111-12.]

Had the jury returned an answer, favorable to defendant, to the fourth question relating to waiver and to any one of the first three questions relating to plaintiff's conduct, the only conclusion of law that could have been drawn, conformably to the doctrine illustrated by the decisions cited above, would have been that plaintiff, being first in default, could not enforce the employment contract against defendant. It becomes of prime importance, therefore, to ascertain whether these questions were answered by the jury under a submission which was free from error affecting defendant's contentions and theories of the case.

A. There Was No Issue of Libel in the Case. The Elaborate Charge on That Subject Was, Therefore, Irrelevant and Necessarily Misleading and Confusing. [Specification of Error, No. 12.]

First: Under the heading "The Question of Communism" the trial judge read to the jury a set of instructions which would have been appropriate only in an action for libel arising out of a false accusation of Communist Party membership. The jury was told that in California it is libelous to call a person a Communist, for the reason that to do so exposes him to the hatred, contempt and ridicule of many persons; that the law recognizes in every man a right to have the estimation in which he stands unaffected by false statements to his discredit; that the law recognizes that men's reputations are tender things and presumes that every person has a good reputation. Accordingly, the charge went on, the law does not require one who has been libelled to prove falsity; rather, falsity is presumed if the publication is unprivileged and the burden is on the person making or repeating the charge to prove its truth. The jury was told further, that the evidence that plaintiff had been called a Communist was proof only of the fact that such statements had been made and that "no one has proved in this lawsuit that these accusations are true."[22] [R. 915-17.]

It is self-evident, we submit, that except for the statement that an accusation of Communist Party membership subjects the person accused to the hatred, contempt and ridicule of many persons, no part of the instruction

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[22]We think it appropriate to remark at this point that when defendant sought to question plaintiff as to whether he was a Communist, the trial court refused to permit the question to be answered. [See, Point II, D, *infra,* p. 118.]

summarized above had any place in the case at bar.[23] The action which was being tried below was, in substance, a breach of contract case, not a libel case. The basic issue was not whether plaintiff had been falsely accused of being a Communist, but whether he had so conducted himself as to tend to shock or offend the community or bring himself into public scorn or contempt or prejudice the interests of his employer or the motion picture industry. And this, in turn, depended, in substantial part at least, on whether, by his actions, he had led the public or a considerable segment thereof to believe either that he was a member of the Communist Party, or was one who sympathized with or approved of what the public believed that party's objectives and methods to be, or was a person who condemned and held in scorn basic American institutions and ideals.[24] Defendant's theory of the case in

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[23]It is a fact of which courts will take judicial notice that many right thinking persons look with scorn and contempt upon one who is a member of or in sympathy with the Communist Party. [See cases cited, Point I, F, *infra,* pp. 107-8.] As might be expected this specific application of the general rule that courts will notice judicially current popular beliefs and public attitudes and states of mind, is usually found in the libel decisions in support of the proposition that a false accusation of Communist membership or sympathy is libelous *per se.* But that fact does not import into another type of case, in which the question of public sentiment toward Communism may be in issue, all or any part of the substantive law of defamation.

[24]It is obviously a fair inference from the fact of refusal to answer a question, when asked on an appropriate occasion, that the answer if given would have been adverse, even when the refusal is placed on constitutional grounds. [2 Wigmore on Evidence (3d. ed.), 162 *et seq.,* Secs. 285-90; *Fross v. Wotton,* 3 Cal. 2d 384, 393, 395, 44 P. 2d 350, 354-5; *Spath v. Seager,* 39 Cal. App. 2d 10, 14, 102 P. 2d 350, 352; *Nelson v. So. Pac. Co.,* 8 Cal. 2d 648, 654-5, 67 P. 2d 682, 685. Compare, *In re MacKay* (D. C., Ind.), 71 Fed. Supp. 397, 400-401.] Plaintiff's refusal to disclose whether he was a member of the Communist Party when that question was put to him by the Committee was plainly susceptible to the inference that he was a Communist. The trial court, however, would not allow defendant to prove that the overwhelming public reaction to plaintiff's conduct was precisely to that effect. [See, Point II, *infra,* pp. 113-15.]

this regard was never adequately or at all presented to the jury by the trial court. Instead, the jury's attention was diverted to a wholly extraneous matter—that of libel—which was not only confusing and misleading because extraneous but seriously prejudicial in substance.

From the earliest times it has been held that it is error to give an abstract instruction having no bearing upon the issues and thus to inject an irrelevant factor into the controversy. This because the necessary tendency of such a charge is to confuse and mislead. [*U. S. v. Breitling,* 61 U. S. 252, 254-5, 15 L. Ed. 900, 902; *Insurance Co. v. Baring,* 87 U. S. 159, 161-2, 22 L. Ed. 250, 251-2; *Cavoretto v. Alaska etc. Min. Co.* (C. C. A. 9), 245 Fed. 853, 854-5; *Beaver v. Taylor,* 68 U. S. 637, 644, 17 L. Ed. 601, 603.][25]

The patent tendency of this instruction to confuse and mislead in the instant case is revealed by a mere reading of the section of the charge presently under discussion. The stated presumption of good reputation [R. 916], especially when considered in the light of the trial court's refusal to permit any evidence of what the public really thought of plaintiff's conduct, could serve only to lead the jury to believe that he had not brought himself into public scorn or contempt and that he had not shocked or offended

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[25]Other cases supporting the proposition stated in the text are: *Quercia v. U. S.,* 289 U. S. 466, 470, 77 L. Ed. 1321, 1325, 53 S. Ct. 698, 699; *Denver Tramway Corp. v. Anderson* (C. C. A. 10), 54 F. 2d 214, 215; *Lachman v. Penn. Greyhound Lines* (C. C. A. 4), 160 F. 2d 496, 501; *McCarthy v. Penn. R. Co.* (C. C. A. 7), 156 F. 2d 877, 882, cert. den. 329 U. S. 812; *Northwestern Mut. L. Ins. Co. v. Stevens* (C. C. A. 8), 71 Fed. 258, 262-3. Applications of the same rule in upholding a refusal to charge are found in: *Howard v. Capital Tr. Co.* (App., D. C.), 163 F. 2d 910, 912, pointing out that ". . . Statements of irrelevant principles of law, however sound in the abstract, have no place in instructions to juries."; *Salmon v. Helena Box* (C. C. A. 8), 158 Fed. 300, 304; *Panama R. Co. v. Davies* (C. C. A. 5), 82 F. 2d 123.

the community. Similarly, the statement that a libelous charge of Communism is presumed to be false and that the accuser has the burden of proving otherwise must necessarily have had the same misleading connotation.

And then, as if to leave no doubt of this negation of defendant's theory of the case, the jury was told that the charge of Communism against plaintiff *had not been proved.* [R. 917.] In the context in which that sentence appears in the charge, it could have been taken as nothing else but a direction that the defense was without support in the evidence.

Second: The prejudicial nature of these irrelevant instructions does not rest in doubt. They went to the very heart of the defense and completely stifled it. They affected the substantial rights of the defendant; and since it cannot be said that it affirmatively appears from the whole record that giving them was harmless, reversible error is fully made out. [*McCandless v. U. S.,* 298 U. S. 342, 347-8, 80 L. Ed. 1205, 1208-9, 56 S. Ct. 764; *Pacific Greyhound Lines v. Zane* (C. C. A. 9), 160 F. 2d 731, 737; *Lynch v. Ore. Lbr. Co.* (C. C. A. 9), 108 F. 2d 283, 285-7; *Ah Fook Chang v. U. S.* (C. C. A. 9), 91 F. 2d 805, 810.][26]

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[26]To the same general effect are: *Bihn v. U. S.,* 328 U. S. 633, 637-8, 90 L. Ed. 1484, 1487-9, 66 S. Ct. 1172, 1174-5; *Bruno v. U. S.,* 308 U. S. 287, 293-4, 84 L. Ed. 257, 260-1, 60 S. Ct. 198, 200-1; *Williams v. Great Southern L. Ins. Co.,* 277 U. S. 19, 26, 72 L. Ed. 761, 767, 48 S. Ct. 417, 419; *U. S. v. River Rouge Imp. Co.,* 269 U. S. 411, 421, 70 L. Ed. 339, 346, 46 S. Ct. 144, 147-8.

B. **The Instruction That the Communist Party and Membership in It Did Not Violate Any Law of California Was One-Sided Because It Charged Upon an Issue Previously Ruled Immaterial and in Respect of Which Defendant's Evidence Was Excluded. It Was Also Incomplete and Misleading Since it Omitted Any Reference to Illegality Resulting From Advocacy of Force and Violence.** [Specification of Error, No. 12]

Interspersed among the instructions on libel was a charge on the legal status of the Communist Party in California. [R. 915-17.] The gist of it was that it is lawful in California to be a member of that party; that the party is entitled to participate in elections, and while, under California law, any party which advocates the overthrow of the government by unlawful means may not participate in primary elections, judicial notice will not be taken of the fact that the Communist Party advocates force and violence; and a registered Communist is not guilty of a violation of California law by the mere fact of membership. [R. 915.] The significance of these propositions, the jury was told, was that they were to be borne "in mind in judging whether the conduct of the plaintiff was as charged by the defendant. . . ." [R. 915-16.]

There are several serious errors in this portion of the charge.

First: Assuming the instruction to have been in all respects correct as an abstract statement of law (which, as

we shall demonstrate in a moment, it was not) it was manifestly one-sided and unfair in the state of the record at the time it was given. The defendant, recognizing that in California judicial notice is not taken of the fact that the Communist Party advocates force and violence [*Communist Party v. Peek,* 20 Cal. 2d 536, 547, 127 P. 2d 889], had sought and offered to prove the fact of such advocacy and the further fact that the party is the agent of a foreign power. The trial court refused to receive the evidence, because he deemed it immaterial and irrelevant. [R. 829-40.]

Having put the record in that condition, was it not inconsistent to tell the jury, for all practical purposes as an unqualified fact, that the Communist Party did not advocate force and violence and, therefore was a lawful organization, membership in which was no crime? By the time this instruction was given the trial judge had apparently concluded that the legality of the party was a material factor to be considered in weighing plaintiff's conduct, since he told the jury exactly that. [R. 915-16.] If it was not material or relevant, as he originally thought, the charge should have been silent on that score. But if it was material, as the jury was instructed it was, then this change in the court's attitude should have been seasonably called to defendant's attention, an opportunity afforded to introduce the countervailing evidence, and *both* sides of the proposition of legality presented to the jury, not just the plaintiff's. [*Western Real Est. Trustees v. Hughes* (C. C. A.

8), 153 Fed. 560, 561; *U. S. v. Messinger* (C. C. A. 4), 68 F. 2d 234, 237, and cases there cited; *Harkinson v. Harkinson* (C. C. A. 8), 101 Fed. 71, 74; *Baer Bros. etc. Co. v. Palmer* (C. C. A. 10), 158 F. 2d 278, 280-1.]

Second: It is not necessarily or at all true that in California the Communist Party is a lawful organization or that membership in it is not a crime. If, as the defendant contended and sought to prove, the organization in fact advocates the overthrow of our present form of government by force, violence or other unlawful means, it and knowing membership in it are criminal. That is the perfectly plain import of the California Criminal Syndicalism Act and the decisions construing it. [*Cal. Stats.,* 1919, c. 188, p. 281; *Whitney v. California,* 274 U. S. 357, 368-72, 71 L. Ed. 1095, 1102-4, 47 S. Ct. 641, 645-7; *People v. McClennegen,* 195 Cal. 445, 452, 234 Pac. 91, 94; *People v. Taylor,* 187 Cal. 378, 385-90, 203 Pac. 85, 87-90; *People v. Steelik,* 187 Cal. 361, 369-70, 203 Pac. 78, 81. See, *Danskin v. San Diego etc. District,* 28 Cal. 2d 536, 544-5, 171 P. 2d 885, 890-1. See, also, *Branch v. Cahill* (C. C. A. 9), 88 F. 2d 545, 546.][27]

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[27]The text of the act, so far as pertinent here, is printed in the appendix to this brief. The cases cited are typical. Many more to the same effect could be added but those referred to sufficiently make out the proposition in question.

To be sure, the evidence which would have made out the criminal character of party membership was not before the jury. But defendant cannot be charged with responsibility for its absence. It necessarily follows, therefore, that the incomplete and defective statement of the law in respect of the issue upon which that proposed evidence bore, should not have been made.

Third: When the trial court informed the jury that a party, which advocates the overthrow of government by unlawful means or which advocates a program of sabotage, may not participate in a primary election [R. 915] the implication must have been plain that this was the only consequence of such advocacy. Yet, as has been shown, far more drastic results may eventuate in the form of a prosecution of its members for and their conviction of a felony.

Laying entirely aside any question of whether the trial court should have admitted defendant's proffered evidence of advocacy of force and violence, it seems to us that there can be no adequate answer to our contention that, if the jury was to be told anything about the legal incidents of such advocacy, it should have been told the whole story, not just a relatively minor part thereof. What the trial court did, however, was to present to the jury plaintiff's theory of the issue while withholding the theory relied upon by defendant. [See cases cited, Point I, C, 6, *infra,* pp. 93-4.]

C. The Instructions Relating to Waiver Submitted to the Jury a Matter Not in Issue, Were Based on Partial Assumptions of Fact and Incorrectly and Incompletely Defined the Law. [Specification of Error, Nos. 10, 14.]

1. The Issue Was Not Pleaded nor Included in the Pre-Trial Order Settling the Issues.

We have already noted that no issue of waiver was raised by the pleadings and that when the issues of fact were settled by the pre-trial order, no suggestion of the existence of such a question was made or included in the order. [Statement of the Case, A, 3, *supra,* pp. 8-9.] That order, by the very terms of the rule authorizing it, was required to be controlling "of the subsequent course of the action, unless modified at the trial to prevent manifest injustice. . . ." [F. R. C. P., rule 16.]

The decisions giving effect to this rule are clear to the point that issues of fact not included within the scope of an order settling the issues should not be gone into at the trial. [*Fowler v. Crown-Zellerbach Corp.* (C. C. A. 9), 163 F. 2d 773, 774; *McCarthy v. Lerner Stores Corp.* (D. C., D. Col.), 12 F. R. S. 16.33, Case 1; *Bryant v. Phoenix Bridge Co.* (D. C., Me.), 43 Fed. Supp. 162, 164; *Berry v. Spokane etc. Ry. Co.* (D. C., Ore.), 2 F. R. D. 483-84. Compare, *Franchon & Marco, Inc. v. Hagenbeck etc. Co.* (C. C. A. 9), 125 F. 2d 101, 104; *McDonald v. Bowles* (C. C. A. 9), 152 F. 2d 741, 742-3; *Berger v. Brannan* (C. C. A. 10), 172 F. 2d 241, 243; *Ringling Bros. etc. Shows v. Olvera* (C. C. A. 9), 119 F. 2d 584,

586. And generally, see, *Holtzoff,* Pre-Trial Procedure, 1 F. R. D. 759, 763; Report of Committee on Pre-Trial Procedure to the Judicial Conference for the District of Columbia, 4 F. R. S. 1015, L. R. 47.]

Since, therefore, the effect of an unmodified order settling the issues is conclusively to exclude all other questions from consideration, the submission of such an excluded issue to the jury is certainly the equivalent of submitting to them a matter not raised by the pleadings.[28] And in the latter situation the rule is clearly and firmly established that it is prejudicial error to give to the jury an issue outside the pleadings. In fact this rule has been said to be "too well-settled to require the citation of authorities. . . ." [*Union Pac. R. Co. v. Garner* (C. C. A. 8), 24 F. 2d 53, 54-5. And to the same general effect are the following among many others: *Cavoretto v. Alaska etc. Min. Co.* (C. C. A. 9), *supra,* 245 Fed. at 855; *Sacramento Suburban etc. Co. v. La Gue* (C. C. A. 9), 40 F. 2d 897, 899; *Kennedy Lbr. Co. v. Rickborn* (C. C. A. 4), 40 F. 2d 228, 230-1; *Gerber v. Borderland Coal Sales Co.* (C. C. A. 6), 5 F. 2d 278, 279; *Shell Pet. Corp. v. Scully* (C. C. A. 5), 71 F. 2d 772, 774.]

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[28]Had there been no pre-trial order it might have been possible to argue that in a declaratory relief action the pleadings do not necessarily confine the case to the precise issues raised, when such enlargement of the dispute is necessary to settle the entire controversy in respect of which a declaration is sought. [See, *Borchard,* Declaratory Judgments (1934 ed.), p. 102.] But nothing in Rule 16 exempts a declaratory relief case from the conclusive effect of an order made pursuant to that rule.

2. **Giving the Conclusive Effect of Waiver to the Mere Circumstance of Retention of the Employee for a Short Time After His Breach of Contract Was Erroneous, Since the Question of Waiver Was One of Fact; the Employer Having, in Law, a Reasonable Time After the Employee's Breach Within Which to Act.**

If we assume that it was proper for the trial court to submit the question of waiver, it goes without saying that the submission should have been accompanied by a correct exposition of the applicable law. This was not done.

First: In the concluding paragraph of the charge on that subject the trial court peremptorily told the jury that if defendant, knowing of plaintiff's conduct before the committee, "put him back to work, and accepted his services with the intention of accepting Cole as its employee" then the plaintiff "waived the right to rely upon such conduct in taking action against Cole." [R. 910.] The same instruction was repeated, with a few immaterial verbal changes but none in meaning, after defendant's objections had been registered. [R. 957-9.] The repetition intensified the not merely damaging, but devastating effect on defendant's case. Since there was no dispute in the evidence over the facts assumed in this instruction, it amounted to a direction to return a verdict for the plaintiff.

But the law does not attach to conduct of the sort described in this direction the inflexible consequences posited by the lower court. Retention of an employee, who has given grounds for termination or acceptance of his services and payment of salary for a short time, do not necessarily or as a matter of law amount to waiver, even when done with knowledge by the employer of the employee's mis-

conduct. In such a case, the employer has a reasonable time after discovery of the employee's dereliction within which to determine what action should be taken. But it still remains a question of fact whether, under all the circumstances, including the retention of the employee during the period pending decision, there has been a waiver or condonation of the employee's breach of duty.[29] [*Moynahan v. Interstate etc. Co.,* 31 Wash. 417, 423-6, 72 Pac. 81. 83; *Rosbach v. Sackett Etc. Co.,* 134 App. Div. 130, 133-4, 118 N. Y. S. 846, 849; *Atlantic Compress Co. v. Young,* 118 Ga. 868, 871-2, 45 S. E. 677, 678-9; *In re Nagel* (C. C. A. 2), 278 Fed. 105, 110; *Jones v. Vestry* (C. C., N. Car.), 19 Fed. 59, 62; *Leatherberry v. Odell Etc. Co.* (C. C. N. Car.), 7 Fed. 641, 648; *Batchelder v. Standard Plunger Elev. Co., supra,* 227 Pa. at 207, 75 Atl. at 1092.]

Second: There was ample evidence from which the conclusion of no-waiver could have been drawn. First of all, is the fact that only one month intervened between the time of plaintiff's appearance before the Committee and the suspension. [R. 471-3.] Since the gravamen of the claim of breach of contract was the public effect of plaintiff's conduct, some time necessarily had to elapse before that effect could have been ascertained and weighed. One

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[29]The rule just stated is, of course, a particularized application of the general principle that condonation or waiver is ordinarily a question of fact [*Lyons v. Brunswick etc. Co.,* 20 Cal. 2d 579, 583, 127 P. 2d 924, 927; *Boyd v. A. E. J. Chivers Co.,* 134 Cal. App. 566, 569, 25 P. 2d 878, 879; *Lackman v. Simpson,* 46 Mont. 518, 525, 129 Pac. 325, 327; *Batchelder v. Standard Plunger Co.,* 227 Pa. 201, 207, 75 Atl. 1090, 1092] and of the further proposition that what is a reasonable time depends upon the circumstances of the case and is also a question of fact. [*Hoppin v. Munsey,* 185 Cal. 678, 684, 198 Pac. 398, 400; *Henningsen v. Anderson,* 212 Cal. 336, 341, 298 Pac. 999, 1001; *Los Angeles etc. Co. v. Wilshire,* 135 Cal. 654, 657, 67 Pac. 1086, 1088.]

month cannot be said, *as a matter of law,* to have been an unreasonable time in that regard, particularly when it is remembered that defendant had to be concerned, not with the public reaction in one or two towns, but with the entire nation. [Cases cited, note 29, *supra,* p. 81.]

Furthermore, there is the significant fact that, immediately after the Committee hearing, plaintiff was told by defendant, in substance, that his situation was doubtful; that defendant's studio head, Mr. Mayer, was very much concerned about the effect of the hearings upon plaintiff and did not approve of the course he had taken; and that the company's public relations director was seeking some statement from plaintiff which could be used to overcome the resulting bad press. [*Statement of the Case,* B, 4 d, *supra,* pp. 27-31.] That statement was not forthcoming until just two or three days before the suspension. By that time defendant had determined to suspend plaintiff unless he complied with certain conditons, one of which was a sworn declaration that he was not a Communist. [*Statement of the Case,* B, 3, *supra,* pp. 21-2.] The affidavit supplied by plaintiff did not contain such a declaration. Instead, it studiously avoided the matter and in addition, contained in briefer compass than before a repetition of plaintiff's previous epithetical and sarcastic castigation of the Congressional Committee, its motives and its good faith. [R. 688-9.] It reaffirmed plaintiff's actual as distinguished from his criminal contempt of Congress and in effect advised defendant that defendant could expect from plaintiff no cooperation in dispelling the adverse public reaction. In other words, it was in such form that had it been publicized, instead of quieting this adverse public reaction to plaintiff's conduct, it would have

aggravated it, and thereby would have defeated the very purpose for which the affidavit was requested by defendant.

Certainly, this evidence would have supported a finding that defendant exercised its rights within a reasonable time. Under the charge as given, however, the jury had no discretion to make such a finding, for they were told that the mere fact that defendant, with knowledge of his conduct, accepted plaintiff's services with the intention of accepting him as its employee, required them to find that the defendant's rights had been waived.

3. The Element of Intentional Relinquishment of a Known Right Was Omitted From the Definition of Waiver, and If Contained Was in Conflict With Other Peremptory Portions of the Charge.

The law of California is clear to the effect that waiver is the *intentional* relinquishment of a known right [*Roesch v. De Mota,* 24 Cal. 2d 563, 569, 150 P. 2d 422, 426; *Alden v. Mayfield,* 164 Cal. 6, 11, 127 Pac. 45, 48; *Wienke v. Smith,* 179 Cal. 220, 226, 176 Pac. 42, 44; *Cohen v. Metropolitan L. Ins. Co.,* 32 Cal. App. 2d 337, 348-50, 89 P. 2d 732, 739; *McDaniels v. General Ins. Co.,* 1 Cal. App. 2d 454, 460, 36 P. 2d 829, 832. Generally, see 25 Cal. Jur. 926, secs. 2, 3.] This element of intentional relinquishment was never clearly explained or put to the jury in the instant case, and that omission taints the entire charge on the subject of waiver.

Of course, waiver may be implied or inferred from conduct susceptible of the inference that a known right is being intentionally relinquished. But whether or not such an inference should be drawn is for the jury to determine under instructions properly delineating the various elements which go to make up a waiver. [Cases cited, note 29, *supra,* p. 81.] Here, however, the trial court did

not leave the issue to the jury as one of fact. Instead, it directed the jury's notice to certain evidence of defendant's conduct and then told them, in necessary effect, that this conduct amounted to waiver as a matter of law. [R. 908-10.]

True enough, the charge did contain one sentence to the effect that a "waiver is such conduct of the employer as shows his election to forego the right to suspend, which he might otherwise have taken or insisted under the contract." [R. 910.] But this one sentence in the midst of over ten paragraphs of instructions of contrary import cannot be said to have cured the error. At best it served only to make the charge on this subject confusing and contradictory. This is especially so when we remember that in the concluding paragraph of that section of the charge the jury was told peremptorily that retention of plaintiff as an employee effected a waiver as a matter of law. [Point I, C, 2, *supra,* pp. 80-83.]

A conflict of this sort in a charge to a jury is, of course, reversible error in and of itself. [*Baer Bros. etc. Co. v. Palmer, supra,* 158 F. 2d at 280-81; *Durant Min. Co. v. Percy Consol. Min. Co.* (C. C. A. 8), 93 Fed. 166, 168-9; *Mideastern Contracting Corp. v. O'Toole* (C. C. A. 2), 55 F. 2d 909, 910-11; *J. H. Sullivan Co. v. Wingerath* (C. C. A. 2), 203 Fed. 460, 461-2. Compare: *Puget Sound Nav. Co. v. Nelson* (C. C. A. 9), 59 F. 2d 697, 700; *Louisville & N. R. Co. v. Johnson* (C. C. A. 7), 81 Fed. 679, 681; *Chicago etc. R. Co. v. Kelly* (C. C. A. 8), 74 F. 2d 80, 84-5.]

4. **While the Verdict to Be Rendered on the Question of Waiver Was Properly Limited to Matters Occurring Subsequent to the Alleged Breach, the Charge Permitted and Invited the Jury to Consider in That Regard the Evidence of Prior Happenings.**

First: As has been previously noted, the question given the jury on the subject of waiver was limited, and properly so, to acts of the defendant occurring subsequent to the alleged breach of contract, *i. e.,* subsequent to the Committee hearing.[30] [R. 163.] But in the charge on this matter the jury was permitted to consider and their attention was specifically directed to the evidence of defendant's statements and conduct *prior* to that time. [R. 907-10.] The jury was thus permitted, in fact invited, to take into account in arriving at their answer to the question of waiver, evidence which was irrelevant to the interrogatory submitted. That too, was error, for the same reason that any instruction not applicable to the issue to be decided is error—its necessary tendency being to confuse and mislead, and, what is worse, to permit decision on the basis of facts which in law are without probative force in support of the issue. [Cases cited, Point I, A, *First, supra,* p. 72.]

It is no answer to this criticism of the charge to say, as was said below, that the references to prior conduct were in relation to inducement of action by plaintiff and not to waiver. [R. 945.] The fact is that the instruction under discussion was contained in the section of the charge headed "The Acts of the Employer Considered as

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[30]That limitation of the scope of the question was brought about by defendant's objection to the original form of the verdict, which was unlimited as to time. [R. 933, 941-2.] But when the same objection was urged to the charge on that subject, it was overruled. [R. 945-6.]

Waiver" which heading was *read to the jury* [R. 907]; and was closely followed by the specific instructions heretofore referred to in which the word "waiver" appeared several times, and which were admittedly intended to apply to that issue. In these circumstances the jury must have understood the instruction as governing their deliberations in respect of their answer to the waiver interrogatory.

On the other hand, no interrogatory or special verdict was given the jury in respect of plaintiff's conduct having been induced by defendant's prior acts. If the charge did not relate to the matter of waiver, there was no occasion to give it at all; and it was, therefore, prejudicially erroneous for that reason. [Cases cited, Point I, A, *First, supra,* p. 72.]

Second: If defendant's acts and statements prior to plaintiff's commission of the alleged breach of contract had any bearing at all on the question of the former's right to take advantage of the breach when it occurred, it could only have been on some theory of amendment of the contract or estoppel. A waiver *in futuro* of a right yet to arise under a written contract, as distinguished from a present waiver of an existing and perfected right, or from an estoppel, cannot be recognized in California. The reason for non-recognition is that to enforce such a future or prospective waiver would be in effect to write out of the contract the provisions claimed to have been waived; and in California a written contract may be amended only "by a contract in writing, or by an executed oral agreement, *and not otherwise.*" [*Cal. Civil Code,* Sec. 1698 (italics ours); *Harloe v. Lambie,* 132 Cal. 133, 136, 64 Pac. 88, 89; *Twohey v. Realty Syndicate Co.,* 4 Cal. 2d 379, 383, 49 P. 2d 819, 820-21; *Urban v. Yoakum,* 89 Cal. App. 202, 208, 264 Pac. 493, 495; *Gladding etc.*

Co. v. Montgomery, 20 Cal. App. 276, 279, 128 Pac. 790, 791.] Conduct of one party to a contract which, it is claimed, has modified the rights or liabilities of the other party under the agreement and which does not amount to an amendatory agreement, can be given prospective operation only when it is such as amounts to an estoppel.

So far as estoppel is concerned, no issue in that regard was pleaded or raised.[31] Furthermore, the jury was not instructed as to the elements necessary to make out an estoppel against taking advantage of plaintiff's breach. They were not told, as a proper charge on that subject would have required, that to constitute an estoppel there must be (1) knowledge of the facts on the part of the person claimed to be estopped; (2) an intention by that person that the allegedly estopping conduct be acted upon, or such action taken by him as *reasonably justifies* the other person in believing that action by the latter was intended to be induced in reliance on the former's conduct; (3) ignorance of the true facts on the other party's side; and, (4) prejudicial reliance. [*Lux v. Haggin,* 69 Cal. 255, 266, 10 Pac. 674, 675-6; *Bank of America v. Pac. Ready-Cut Homes,* 122 Cal. App. 554, 561, 10 P. 2d 478, 481, and cases there cited. For a complete citation to the California decisions, see, 10 Cal. Jur. 626 *et seq.,* Secs. 14-21.]

In the light of these principles, and since only the question of waiver was given the jury, it was proper, as was done in the form of verdict, to limit that question to conduct occurring after the time of the alleged breach; but by the same token, it was prejudicially erroneous to nullify

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[31]The trial judge was of the opinion that estoppel was not involved and that he was *not* instructing on the law in that regard. [R. 946.]

that limitation by permitting the question to be answered on the basis of what took place prior to that time.

5. The Charge That Plaintiff Was Entitled to Act as He Did Before the Committee Because of His Subjective Belief as to Defendant's Attitude Erroneously Excluded From the Jury's Consideration the Question of Whether There Were Reasonable Grounds for the Belief and Improperly Assumed That Defendant Knew What Plaintiff's Conduct Was Going to Be.

As part of the charge on waiver, the jury was told that if plaintiff was led to believe by the defendant that the latter was not concerned about whether he was a Communist and did not inform him of any change in that attitude or instruct him as to how to conduct himself before the Committee in advance of his appearance, then plaintiff had "the right to pursue the conduct he had decided upon on the basis of the prior acts and statements [of defendant] . . . without regard to any later claim or possible claim by his employer that because of his conduct the public might be led to believe that he was a Communist."[32] [R. 908-9.] This instruction is erroneous for reasons in addition to those already discussed.

First: The question as to whether plaintiff, under all the facts, had the *justifiable right* to believe that he could

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[32]The reasoning implicit in this instruction involves an obvious *non-sequitur*. There is a great and readily discernable difference between defendant's lack of concern over plaintiff's *private* political affiliations and its very great concern over his conduct, and the effect of that conduct on the public, when those affiliations were being properly and publicly inquired into by the legislative branch of the federal government. It does not necessarily follow that because defendant was unconcerned about the one it would also be indifferent to the other.

do as he saw fit before the Committee, was not covered in the charge as given. It was enough, so far as anything the jury was told, that plaintiff should have been led to that belief, no matter how unreasonable or unjustifiable his conclusion may have been in the premises.

As we have shown, defendant's prior acts could not bar its right to assert a subsequent breach of contract except by way of estoppel or modifying agreement. And when it is estoppel that is to be dealt with, it is not sufficient that one person has been led to change his position in reliance on the other's statements; the statements must have been such and made under such circumstances as reasonably to have justified the belief that they were intended to be acted on. [*Parker v. Funk,* 185 Cal. 347, 352-3, 197 Pac. 83, 85-6; *Amer. Nat. Bank v. Sommerville,* 191 Cal. 364, 372-4, 216 Pac. 376, 379-80; *Griffith v. Brown,* 76 Cal. 260, 262, 18 Pac. 372, 373. Cases cited, Point I, C, 4, *Second, supra,* p. 87.] Whether or not such intent was present in the case at bar was, obviously, a question of fact which the jury should have been allowed to consider in determining if defendant had "waived" its right to claim a breach of contract. [*Parke v. Franciscus,* 194 Cal. 284, 228 Pac. 435, 441; *Di Nola v. Allison,* 143 Cal. 106, 115, 76 Pac. 976, 979; *Bashore v. Parker,* 146 Cal. 525, 530, 80 Pac. 707, 709.]

The omission of this important consideration from the charge was particularly harmful, since it had the effect of eliminating from the jury's consideration the clear and positive evidence that before plaintiff took the stand in

Washington he had heard statements by Mr. Mayer and Mr. Johnston indicating quite plainly that any involvement with Communism would jeopardize his employment. [*Statement of the Case,* B, 5, *supra,* pp. 31-2.] That evidence would have supported a finding that on October 30, 1947, the day plaintiff testified, he was not justified in believing that "the course of conduct he had decided upon . . ." would not have any effect on his employment.

Furthermore, this particular instruction, it will be recalled, ended with the peremptory direction that if plaintiff had been led to the indicated belief, "he had the right to pursue the course of conduct he had decided upon . . ." without regard to any claim of breach of duty. [R. 908-9.] In other words, having that belief, his conduct was not a breach of contract. But a finding that he was not justified in holding such a belief—a finding the jury was not given the opportunity to make—would have required a different conclusion of law.

The instruction, therefore, falls squarely within the doctrine that exclusion from the jury's consideration of a material element that needed to be considered in determining whether a particular defense had been established is prejudicial error. [*Fillippon v. Albion Vein etc. Co.,* 250 U. S. 76, 82, 63 L. Ed. 853, 856, 39 S. Ct. 435, 437; *N. Y. Life Ins. Co. v. Rees* (C. C. A. 6), 19 F. 2d 781, 788-9; *Durant Min. Co. v. Percy Consol. Min. Co., supra,* 93 Fed. at 168-9.]

Second: In this same connection the trial court told the jury that if defendant knew that plaintiff had been subpoenaed to appear before the Committee and desired that plaintiff there conduct "himself . . . in a certain manner, the defendant Loew's had a right to give reason-

able and specific instructions to Lester Cole and . . . it was his duty to follow them, if they were reasonable."[33] [R. 909-10.] Having regard to the context in which this direction was given and its connection, by express reference, to that portion of the charge in which the jury was told that plaintiff had the right to refuse to answer the question as to whether he was a Communist [R. 908-9], the only significance it could have had to the jury was that defendant's failure to instruct plaintiff how he should conduct himself left him free to act as he desired without contractual responsibility to defendant even though his conduct contravened the public relations clause. This faulty aspect of the charge is emphasized by the fact that plaintiff testified below that he had been given no instructions as to how he should or should not conduct himself before the Committee. [R. 696.]

Assuming for the moment, however, that defendant had the right to instruct plaintiff, it does not follow at all that it had an obligation so to do or that its failure to do so amounted to a waiver of plaintiff's contract obligations or an authorization to plaintiff to breach his contract. In the charge, this "duty" of defendant to give plaintiff instructions as to his conduct before the Committee, was made to depend on and arise from the mere fact that defendant knew that plaintiff had been subpoenaed. [R. 909.] The implication thus is that defendant should have anticipated, because of that far from unusual circum-

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[33]The jury was not given any criterion of reasonableness. They were thus without the materials with which to decide, for example, whether it would have been reasonable to instruct plaintiff to answer the question as to whether he was a member of the Communist Party, when plaintiff was strenuously insisting that the question was impertinent to the investigation, an invasion of his constitutional rights, and beyond the power of the Committee to ask. We doubt very much that plaintiff will concede that any such instruction by defendant would have been one which he was bound to obey.

stance, that in the absence of instruction, plaintiff would contemn and revile the Congress of the United States, defy its authority and violate the Federal statutes dealing with conduct of witnesses before committees of Congress.

Actually, however, defendant had every right to presume that the law would be obeyed and that accordingly plaintiff would behave with proper decorum and respect and that he would answer all pertinent questions put to him by the Committee.[34] Especially was defendant entitled so to assume in view of plaintiff's completely unforced denial of Communist affiliations made to Mr. Mayer some time before the hearing; and of the plain and uncontradicted evidence here that plaintiff at no time informed defendant of his purpose to conduct himself in the manner in which he did or of his design not to answer any questions relating to Communist Party membership. [R. 349, 309-10, 351, 420-1, 499, 743-4.]

Furthermore, plaintiff was already bound, by his contract, not to do anything which would tend to bring him into public scorn or contempt, shock or offend the community, or prejudice the interests of his employer. That obligation was not modified or annulled simply because

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[34]There can be no serious doubt of the pertinency of the questions put to plaintiff by the Committee. [*Lawson v. U. S.* (App. D. C.), ... F. 2d ....., decided June 13, 1949; *Morford v. U. S.* (App. D. C.), ... F. 2d ....., decided June 13, 1949; *Barsky v. U. S.* (App. D. C.), 167 F. 2d 241, 246, 250, *cert. den.* 334 U. S. 843, *applic. for rehear.* pending; *U. S. v. Josephson* (C. C .A. 2), 165 F. 2d 82, 88-9, *cert. den.* 333 U. S. 838, *rehear. den.* 333 U. S. 858.]

the defendant may not have seen fit from time to time to remind plaintiff that he had so agreed. The parties must be deemed to have known what they agreed to; and there is certainly no evidence that plaintiff did not know. The conclusion is implicit in the court's charge, however, that an integral provision of a contract is in some way dropped out of the agreement simply because the promisee did not tell the promisor, at a time when no default had yet occurred, that performance would be expected in accordance with its terms. That conclusion, we respectfully submit, is obviously an erroneous proposition of law.

6. The Charge Gave Undue Prominence to the Theory and Evidence of Plaintiff on Waiver, at the Same Time Minimizing and Omitting to Mention Defendant's Opposing Theory and Evidence.

It was, of course, the duty of the trial court not to direct the jury's attention solely to the theory and evidence favoring one side of the controversy while ignoring or giving relatively less attention to the opposing theory and testimony. It was similarly the court's duty not to single out for especial mention one circumstance or set of circumstances which did not comprise all of the relevant evidence on the point. [*Allison v. U. S.*, 160 U. S. 203, 212, 40 L. Ed. 395, 399, 16 S. Ct. 252; *Sperber v. Conn. Mut. L. Ins. Co.* (C. C. A. 8), 140 F. 2d 2, 5, *cert. den.* 321 U. S. 798; *Palmer v. Miller* (C. C. A. 8), 145 F. 2d 926, 931; *Weiss v. Bethlehem Iron Co.* (C. C. A. 3), 88 Fed. 23, 30, *cert. den.* 176 U. S. 685.

See, also, the cases cited, Point I, B, *First, supra,* pp. 75-6.]

Just such error is to be found in the charge on waiver in the instant case. In that charge the plaintiff's theory that he was immune from any responsibility to defendant for his conduct because he had been led to believe that defendant was not concerned about charges that he was a Communist, was fully stated, with direct references to the testimony in that connection. [R. 907-9.] But there is not one word in the instructions about the opposing theory of defendant, or about the evidence supporting that theory, that by the time plaintiff was sworn to testify in Washington he had compelling reason to believe that his employer might be very much concerned indeed, if the charges that he was a Communist found support in what took place in the hearings. [*Statement of the Case,* B, 5, *supra,* pp. 31-2; Point I, C, 5 *First, supra,* pp. 88-90.] The cases cited above demonstrate the error in this handling of the matter in the case at bar.[35]

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[35]We have already pointed out that prior to the trial the defendant filed an application, on the ground of personal bias and prejudice of the judge to whom the case was assigned, to have it transferred to another District Judge; and that this application was denied. [*Statement of the Case,* D, *supra,* p. 38.] In such a situation, it has been said "that where the sufficiency of the affidavit is at least debatable . . . the reviewing court will consider whether actually in the trial of the case any prejudice was manifested toward the affiant by erroneous rulings or by the manner and demeanor of the judge towards the affiant . . ." [*U. S. v. Buck* (D. C. Mo.), 23 Fed. Supp. 503, 506.] In addition to the errors discussed in this brief, we invite consideration, in this connection, of the matters appearing in the Record, pp. 228-9, 233-41, 246-8, 292-3, 492-3, and 725-7, as indicative of the trial court's general attitude.

D. The Extensive Charge on the Rights of Witnesses Before Congressional Committees Was Irrelevant to the Issues of Fact Submitted to the Jury; It Left It to the Jury to Determine as a Matter of Law Whether Plaintiff's Conduct Was Lawful (and, at Best by Implication, Within Plaintiff's Contract Rights); and It Omitted Important Elements of the Law in That Regard. [Specification Error, No. 11.]

The trial court instructed the jury quite fully on "The Rights of Witnesses Before Committees" dealing, in that connection, with the right to make non-responsive answers, to invoke the Constitution, to precipitate a test of pertinency by declining to answer questions, the elements required to make out a contempt and similar matters bearing on whether plaintiff was in contempt on account of his conduct. [R. 911-13.] This portion of the charge was, like the others we have discussed, prejudicially erroneous.

1. The Issue to Be Decided by the Jury Was Whether Plaintiff's Conduct Had Tended to Bring Him Into Public Disrepute, Not Whether He Was Technically Guilty of a Contempt of Congress.

First: A reading of the charge will demonstrate, we believe, its irrelevance. Had the case been the trial of the indictment against plaintiff for his alleged contumacious conduct, this section of the instructions might have had some bearing. But the question which was involved below was not the one raised by that indictment, but simply whether plaintiff's conduct had the tendency to bring about the public consequences interdicted by the employment contract. That tendency, in view of the nature of plaintiff's conduct and the well known attitude of the great majority of the American public toward Com-

munism, was inherent in his conduct quite independently of his technical guilt or innocence of the charge of contempt.

Necessarily, therefore, this instruction tended to divert the jury from the real issue in the case and permitted them to frame their answers to the interrogatories upon a false and irrelevant basis. The decisions previously cited as to the erroneous nature of such instructions, *supra*, p. 72, are applicable here.

Second: One portion of this instruction was also irrelevant, even if it be assumed that some charge on the rights of Committee witnesses was proper. The concluding paragraph was a statement that "even the alien in our midst . . . has certain rights and privileges which he may assert and which it is the duty of a legislative committee to respect and of the courts to protect." [R. 913.] There is no alien involved in the instant case. The statement, therefore, is without any relevancy whatever. It is argumentative in form and effect. Its import, it seems to us, can only be an intimation that plaintiff, as a native-born citizen [R. 79], was entitled to even more protection than an alien and that in some unspecified way he had failed to receive this at the hands of the Committee.

2. The Charge as a Whole Left It to the Jury to Decide as a Matter of Law Whether Plaintiff's Conduct Was Lawful or Contemptuous.

First: Whether plaintiff's conduct before the Committee was lawful, as distinguished from its tendency to bring plaintiff into public disrepute, was not properly an issue in this case. But if it was a matter to be decided, it was certainly a question of law, not one of fact. The evidence of what plaintiff said and did while a witness

at the Committee hearing was uncontradicted. So, this not being a trial of the indictment involving that conduct, it was for the court, not the jury, to decide the legal effect of the evidence in this regard. [*Sinclair v. U. S.,* 279 U. S. 263, 298-9, 73 L. Ed. 692, 700, 49 S. Ct. 268, 273-4; *Owens v. Dancy* (C. C. A. 10), 36 F. 2d 882, 885, *cert. den.* 281 U. S. 746; *Dunegan v. Appalachian Power Co.* (C. C. A. 4), 23 F. 2d 395, 398; *Wright v. Farm Journal* (C. C. A. 2), 158 F. 2d 976, 978; *Brown v. Oregon King Min. Co.* (C. C., Ore.), 110 Fed. 728-9.]

Had such a determination been made, the jury would then have been told that plaintiff's conduct was unlawful. There can be no doubt that a Congressional Committee has the power to ask and compel answers to pertinent questions. [2 U. S. C. A. Sec. 192; *In re Chapman,* 166 U. S. 661, 668, 671, 41 L. Ed. 1154, 17 S. Ct. 677, 680-1; *Townsend v. U. S.* (App. D. C.), 95 F. 2d 352, 354-5, *cert. den.* 303 U. S. 664; *Sinclair v. U. S., supra,* 279 U. S. at 294-6, 73 L. Ed. at 698-9, 49 S. Ct. at 272-3; *U. S. v. Bryan* (D. C., D. Col.), 72 Fed. Supp. 58, 63, *aff'd. sub. nom. Barsky v. U. S.,* note 34, *supra,* p. 92; *Fields v. U. S.* (App. D. C.), 164 F. 2d 97, 99-100, *cert. den.* 332 U. S. 851.] The authority to investigate the subject of Communism is plainly granted by the *Legislative Reorganization Act of 1946, supra,* page 10, and has been affirmed in the cases cited in note 34, *supra,* page 92. The validity of that grant of power has been upheld against attack on Constitutional grounds. [*Dennis v. U. S.* (App. D. C.), 171 F. 2d 986, 987-8, *pet. for cert.* pending. Also, cases cited, note 34, *supra,* p. 92.] And when the subject of a particular investigation is the infiltration of Communists into an industry of public information and instruction, it is certainly a pertinent

question to ask of one who prepares the material publicly disseminated by that industry whether he is or ever has been a member of the Communist Party. [*Barsky v. U. S., supra,* 167 F. 2d at 250. *Josephson v. U. S., supra,* 165 F. 2d at 88. See, also, *U. S. v. Lawson* (unreported), U. S. D. C., Dist. of Col., Crim. case No. 1352-47, and *U. S. v. Trumbo* (unreported), U. S. D. C., Dist. of Col., Crim. case No. 1353-47, *aff'd* (App. D. C.), ... F. 2d ....., decided June 13, 1949.][36]

Plaintiff's refusal to answer that question was, therefore, obviously a violation of the law.

Second: True enough, the jury was given an abstract statement of two elements required to be shown to uphold a charge of contempt, the purport of which was then summarized in the statement that a witness may properly refuse to answer where the bounds of the power are exceeded or the questions are not pertinent.[37] [R. 912-13.] It may be doubted, however, that this exposition had the same impact on the jury as it would have on a lawyer reading it in cold type and by itself. In view of the charge on this subject as a whole, in which the implication was plain and inescapable that plaintiff had a right to be irresponsive in his answers, and also the right to invoke judicial review by refusing to answer at all, the conclusion

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[36]Copies of the indictments and excerpts from the charge to the jury in the *Lawson* and *Trumbo* cases will be found in the appendix to this brief. From these it will be seen that the defendants there involved were charged with violation of Title 2, Sec. 192 of the U. S. Code for having refused, in manner closely similar to that of plaintiff here, to answer the Committee's question as to Communist membership, and that the question was held to have been pertinent.

[37]The jury was not told under what circumstances "the bounds of the power" would be exceeded; nor were they given any guides for determining whether any question was pertinent. This omission emphasizes the error of leaving this matter of contempt to the jury.

was virtually compelled that plaintiff had not committed any contempt.

Be that as it may, the point here is that if the question of contempt *vel non* was in the case at all, it was a question of law to be decided by the court on the uncontradicted evidence before it; not a matter to be given the jury for determination of the legal effect of that evidence as they saw fit.

3. The Charge Conveyed the Erroneous Impression That a Refusal to Testify in Order to Bring About a Judicial Determination of Pertinency Would Be Lawful.

As part of the charge on the rights of witnesses before committees, the trial court instructed the jury that such a witness has the right to invoke his constitutional rights; to have those and other legal rights determined by the courts; and to that end, rightly or wrongly and even though he is subjected to penalties, to refuse to answer questions in order to secure such a determination, in which event he paves the way for contempt proceedings in the courts, not before the Committee. [R. 911-13.]

The vice of this instruction is that it connotes a want of criminality in a contemptuous refusal, so long as the refusal is inspired by an erroneous desire to preserve constitutional rights or procure a judicial determination of those rights.[38] In fact, however, while a witness may refuse to answer a question because he deems it to be improper, he is bound to judge correctly of its propriety; and if he does not, he is just as guilty of contempt as one whose refusal is grounded in admitted defiance of the Congressional power. [*Sinclair v. U. S., supra*, 279

[38]The constitutional right claimed by plaintiff was not any right or privilege against self-incrimination but something referred to by him as his "rights of association." [R. 483.]

U. S. at 299, 73 L. Ed. at 700, 49 S. Ct. at 274; *Fields v. U. S., supra,* 164 F. 2d at 100; *Dennis v. U. S., supra,* 171 F. 2d at 990; *Eisler v. U. S.* (App. D. C.), 170 F. 2d 273, 280, *cert. granted* 93 L. Ed. (adv. op.) 40; *Townsend v. U. S., supra,* 95 F. 2d at 360-1.]

The conditions under which a refusal would be wrongful were not set out in the charge below, except in the abstract manner already referred to. [Point I, D, 2, *Second, supra,* pp. 98-9.] The fact that an intentional refusal, no matter how motivated, would be a contempt was not clearly or at all given to the jury. The impression that plaintiff had not acted wrongfully in acting as he did, could not be avoided from the charge as a whole, and it was not dissipated by any occasional sentence in it which, by itself, may have been a correct statement.

4. **Since the Jurors Had to Assume That the Charge as Related to Plaintiff's Contempt Was Pertinent and Since the Charge Virtually Told Them Plaintiff Had Not Committed Contempt, the Jurors Had to Weight Their Answers to the Special Interrogatories With This Conclusion.**

Irrelevant matter in a charge is necessarily confusing and misleading to the jurors, for the reason that they must assume that such matter is there because it bears upon the answer they are required to give, whether that answer is in the form of a general verdict or an answer to special interrogatories. [Cases cited, Point I, A, *supra,* p. 72.] When, as in the instant case, the charge tells the jurors in effect that it is important to determine whether plaintiff was in contempt and then virtually tells them that he was not in contempt, the jurors cannot escape the conviction that this means that their answer must be favorable to plaintiff or, at very least, that this fact of non-contempt must weigh heavily in plaintiff's favor.

E. On the Subject of Plaintiff's Conduct the Instructions Were Contradictory and Inconsistent With Each Other in Respect of Plaintiff's Obligation Under the Public Relations Clause. [Specification of Error, Nos. 8, 9.]

The public relations clause, as it was written in the contract, prohibited conduct which *tended* to produce publicly discrediting consequences of the sort specified in it. It was not made a requirement of violation that the conduct should actually have produced such consequences. The difference between the two situations is, of course, a real and substantial one. Accordingly, in that portion of the charge in which the nature of the action and of the contract was set out, the trial court informed the jury that the question to be determined was whether the conduct of plaintiff "did shock or tend to shock and offend the community and/or brought the plaintiff or tends to bring the plaintiff, into public scorn or contempt. . . ." [R. 901.]

But, in the succeeding section of the charge, after stating certain abstract rules of the law of master and servant, the trial court, in applying those rules to the facts of the pending case, ignored the fact that the contract related to conduct *tending* to public disrepute and peremptorily instructed that it was "necessary for the defendant to prove by a preponderance of the evidence that the plaintiff Lester Cole personally so conducted himself that he was held in public scorn, hatred, contempt or ridicule, or that his conduct shocked or offended the community or prejudiced the defendant or the industry in general." [R. 905-7.]

The reason for thus expanding defendant's burden of justification was said to be that in the notice of suspension

the grounds of the suspension were stated to be that plaintiff had conducted himself so as to bring himself into disrepute; and, as a matter of law, when "the contract specifies the grounds for its termination or suspension, and written notice of such ground is provided for, the employer, in order to justify his action, must show that the ground given in the notice actually existed. If he does not do so, by a preponderance of the evidence, he cannot justify his action upon other grounds named in the contract which, although true, were not stated in the notice." [R. 906.] This limitation to the grounds stated in the notice was repeated in another context later in the charge. [R. 917.]

First: Assuming that the reason given for this limitation was valid (the authorities, as we show in a moment, demonstrate that it is not) it still does not eliminate the obvious and direct conflict in the instructions just noted. In one breath the jury was told that in "answering the special interrogatories . . . you must determine . . . whether the conduct of the plaintiff . . . was of such character that you, as jurors can say that . . . it did . . . tend to shock and offend the community . . . or tends to bring the plaintiff, into public scorn and contempt. . . ." [R. 901]; and in the next breath they were told that it was necessary for defendant to prove that plaintiff's conduct actually had the effect of bringing him into scorn or contempt and so forth. [R. 906-7.] The cases previously cited on the prejudicial nature of conflicting instructions, *supra,* page 84, are directly in point here.

After the objectionable nature of the charge had been pointed out by defendant [R. 924-5, 943-5] one of the

instructions was modified and re-read. As modified, it adhered to the proposition that the defendant was limited to the grounds specified in the notice of suspension; stated that in that notice defendant had "notified the plaintiff that it suspended the plaintiff upon the ground that he so conducted himself . . . as to bring himself or tend to bring himself into public scorn, hatred, contempt or ridicule, or shock or offend or tend to shock or offend the community. . . ."; and that, therefore, defendant had to prove "by a preponderance of the evidence that such was the case" before the jury could answer in the affirmative the first three questions submitted to them. [R. 956.]

The jury was not told which part of the original charge was replaced by the modified instruction or that there was any error in the instructions previously given; nor were those instructions expressly withdrawn. The instruction that justification was not proved if the ground stated in the notice was not established, was not changed at all. [R. 906.] Furthermore, by lumping tendency and actual effect into one sentence and then using the ambiguous phrase, "that such was the case," in the peremptory part of the modified charge, the vital difference between the two concepts was not clarified or explained but, if anything, blurred.

The modification, therefore, cannot be held to have cured the conflict in the instructions. At best, it merely intensified and emphasized that conflict. The controlling rule here is that when "it is proposed by a further instruction to correct an erroneous charge, the purpose should be stated, and the explanation made so clear as to leave no room for reasonable mistake." [*Louisville & N. R. Co.*

v. Johnson, supra, 81 Fed. at 681. And to the same effect are: *Puget Sound Nav. Co. v. Nelson* (C. C. A. 9), *supra,* 59 F. 2d at 700; *Chicago etc. R. Co. v. Kelley, supra,* 74 F. 2d at 84-5; *Baer Bros. etc. Co. v. Palmer, supra,* 158 F. 2d at 280-1.]

Second: The basic premise on which the trial court acted, and which was responsible for this conflict, is a mistaken one. For the law is thoroughly settled that an employer may justify, in a case involving the employment relation, on any ground which in fact existed at the time of his action, whether or not it was specified in the notice, and even if it was unknown to him when he gave his notice. [*In re Nagel, supra,* 278 Fed. at 109; *Farmer v. First Trust Co.* (C. C. A. 7), 246 Fed. 671, 673; *Carpenter Steel Co. v. Norcross* (C. C. A. 6), 204 Fed. 537, 539-40; *Independent L. Ins. Co. v. Williamson,* 152 Ky. 818, 822, 154 S. W. 409, 411; *Macauley v. Press Pub. Co.,* 170 App. Div. 640, 646, 155 N. Y. Supp. 1044, 1048, aff'd. 222 N. Y. 696, 119 N. E. 1055 mem.; *Corgan v. Geo. F. Lee Coal Co.,* 218 Pa. 386, 389-90, 67 Atl. 655, 656; *Thomas v. Beaver Dam Mfg. Co.,* 157 Wisc. 427, 429, 147 N. W. 364, 365; *Beck v. Fybern Holding Corp.,* 238 App. Div. 25, 28-9, 263 N. Y. Supp. 9, 12; *Allen v. Aylesworth,* 58 N. J. Eq. 349, 351-2, 44 Atl. 178, 179.][39]

When the contract expressly requires that a written notice *specifying* the grounds of discharge or suspension

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[39]Many more decisions to the same effect could be cited. They may be found collected in: 39 C. J. 89, notes 70, 72; 56 C. J. S. 428, note 20; 56 C. J. S. 435, Sec. 44.

be given the employee, it has been held that the employer may justify only on the grounds so assigned. [*Kiker v. Bank Sav. L. Ins. Co.,* 37 N. M. 346, 349, 23 P. 2d 366, 368, and cases there cited.] It was this exception to the rule which the trial judge gave the jury in the case at bar. [R. 906.] But there was error in so doing for the reason that the contract in suit *does not* require any such notice. The instruction was not applicable to the case submitted to the jury.

It was also a misapprehension of the contract to have assumed as a fact in the charge that the contract specified the grounds for termination or suspension. Connected, as this reference was, with the theory set forth in the charge that justification was limited to the grounds specified in the notice of suspension, it must have been construed by the jury as an intimation that no grounds other than those mentioned in the notice were covered by the agreement. The contract, however, expressly provides that it may be terminated *or* the employee's compensation suspended for "failure, refusal or neglect of the employee to perform his required services or observe *any of his obligations*" thereunder. [R. 17. Italics ours.] One of the employee's obligations was, of course, not to do anything which would *tend* to bring him into public disrepute. Furthermore, even if the contract had specified the grounds of suspension, it would not necessarily have precluded resort to others in justification. [*Corman Aircraft Corp. v. Weihmiller* (C. C. A. 7), 78 F. 2d 241, 243.]

F. Since Courts Will Take Judicial Notice That a Large Part of the American Public Looks With Scorn and Contempt on Persons It Believes to Be Communists the Jury Should Have Been so Instructed. [Specification of Error, No. 13.]

Defendant requested the trial court to charge that a fact judicially noticed was deemed to have been established without any evidence, and that such a fact was that "many average and respectable persons in this country look with scorn and contempt upon the Communist Party of America and upon its members and sympathizers." The request was refused. [R. 128-9, 101.] It should have been given, especially as the court refused to receive direct evidence of the fact and informed defendant that the jury would be permitted to decide that question from their personal knowledge of the state of public feeling in their own communities. [R. 617-20, 719-20, 829-39.]

First: The Federal courts are now required to receive "all evidence which is admissible . . . under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held. . . ." [F. R. C. P., Rule 43(a).] Judicial notice is, of course, a rule of evidence so that the state rules and statutes in that regard furnish at least one source of Federal practice. [*Hagen v. Porter* (C. C. A. 9), 156 F. 2d 362, 365.] In California "the court is bound to declare [its judicial] knowledge to the jury, who are bound to accept it." [*Cal. Code of Civil Procedure,* Sec. 2102; *People v. Mayes,* 113 Cal. 618, 625-6, 45 Pac. 860.]

Second: Courts generally will take judicial notice of public attitudes, beliefs and states of mind which are

matters of common knowledge.[40] Even if there were no decisions directly in point on the facts, this proposition would compel judicial notice of the current attitude in this country toward Communists. One cannot read a daily newspaper or hold any ordinary conversation on current affairs without observing overflowing evidence of this attitude.

Actually, however, there are a number of cases which may be cited in support of the application of the general rule to the exact case of public feeling about Communists.[41] They are the cases holding it libelous *per se* falsely to accuse one of being a Communist or a Communist sympathizer. The necessary premise of such a

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[40]Examples of this rule are: *State of Calif. v. Anglim* (C. C. A. 9), 129 F. 2d 455, 459, *cert. den.* 317 U. S. 669 (that a certain concept concerning railroad employees is reasonable, based on the court's knowledge of the minds of workmen); *Penn. Co. v. Helvering* (App. D. C.), 66 F. 2d 284, 285 (large number of persons oppose vivisection); *James v. Kuhn,* 121 Cal. App. 69, 71, 8 P. 2d 526, 527 (contemporaneous events of general knowledge and repute); *Vremeister v. White,* 179 N. Y. 235, 239-40, 72 N. E. 97, 98-9 (common belief of people of New York in 1904, that vaccination is a preventive of smallpox); *Rowland v. Miller,* 139 N. Y. 93, 102-3, 34 N. E. 765, 767 (undertaking business in a residential neighborhood would be offensive to people of ordinary sensibilities); *McGuire v. State,* 76 Miss. 504, 513-14, 25 So. 495, 497-8 (many persons called for jury duty are opposed to capital punishment and that Christian people regard life imprisonment as a more merciful punishment); *Axton etc. Tool Co. v. Evening Post Co.,* 169 Ky. 64, 84, 183 S. W. 269, 276-7 (in 1916, union labor constituted a well-organized body whose organization rules were carefully observed by their members); *Indianapolis Journal etc. Co. v. Pugh,* 6 Ind. A. 510, 517, 33 N. E. 991, 993 (public has a sympathetic feeling toward the soldiers who fought in the Civil War and toward their widows and children).

[41]Note that this is not a question of taking judicial notice of the objects or methods of the Communist Party, but of the state of the public mind, the beliefs of the public or of a large part of it, with regard to Communism and Communist Party membership.

holding is, of course, the court's judicial knowledge that such a charge would subject one to obloquy because there are many average and respectable persons who look with scorn and contempt upon Communists and their sympathizers. [*Spanel v. Pegler* (C. C. A. 7), 160 F. 2d 619, 622; *Grant v. Reader's Digest Ass'n.* (C. C. A. 2), 151 F. 2d 733, 734-5, *cert. den.* 326 U. S. 797; *Mencher v. Chesley,* 297 N. Y. 94, 100-1, 75 N. E. 2d 259-60; *Gallagher v. Chavalas,* 48 Cal. App. 2d 52, 57, 119 P. 2d 408, 412; *Wright v. Farm Journal, supra,* 158 F. 2d at 978-9; *Washington Times Co. v. Murray* (App., D. C.), 299 Fed. 903, 905-6; *Annotation,* 171 A. L. R. 709. See, note 23, *supra,* p. 71.]

Third: The fact that in the charge on libel and the status of the Communist Party, the trial court told the jury that an accusation of Communism "would expose a person to the hatred, contempt and ridicule of many persons" was not the equivalent of the charge requested by defendant. In the first place, this statement was not given to the jury as a fact judicially noticed which they were bound to accept in lieu of evidence, but only as an explanation of why it was libelous as a matter of law falsely to accuse one of being a Communist. In the second place, it was so surrounded by other confusing and misleading instructions on the law of libel and the legal status of the Communist Party, that whatever effect it might otherwise have had was completely nullified. [Point I, A, B, *supra,* pp. 70-77.] And in the third place, it did not include non-Communists who nevertheless sympathize with or in

some way support the Communist program but who, as the cases above cited show, are nevertheless embraced within the range of the public feeling of scorn and contempt. [*E. g.,* see *Spanel v. Pegler, supra,* 160 F. 2d at 623.]

Fourth: Neither was it an adequate substitute for defendant's requested instruction, to permit the defendant to argue the issue on the basis of the jury's personal knowledge. Such an argument, with no evidence, or charge on judicial notice, vouched to its support, could not possibly have had the impressive or persuasive force of an argument founded on the record. Particularly was this true when it is recalled that the jury was instructed that the "statements, arguments, comments or suggestions [of counsel] are not evidence and must not be considered as such by you. . . . You are to decide this case solely upon *the evidence* that has been introduced before you and the inferences which you may deduce therefrom. . . ." [R. 895; italics ours]; and also that in determining whether plaintiff's conduct had the discrediting effect or tendency claimed by defendant they were "not to speculate or to guess. If . . . not satisfied by a preponderance of *the evidence* that such was the fact, you are to find that his conduct did not have any of the effects stated in the [public relations] clause." [R. 903-4. Italics ours.] From the viewpoint of the jurors there was no "evidence" and for all practical purposes the jury was instructed that the defendant had failed in its proof.

II.

THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT IN ITS RULINGS ON THE ADMISSION AND EXCLUSION OF EVIDENCE.

A. The Plaintiff Having Opened the Door to Evidence of Joint Action by the Motion Picture Industry Against All Ten of the Unfriendly Witnesses Because of Their Conduct Before the Congressional Committee, Defendant Was Entitled to Show What That Conduct Was. [Specification of Error, No. 1.]

As has been noted in our Statement of the Case, *supra,* pages 21-23, plaintiff was allowed to show, as part of his case-in-chief, that representatives of virtually all motion picture producing companies had agreed upon a statement of policy not to continue to employ any of the ten unfriendly witnesses who, before the Committee, refused to reveal whether they were Communists. It is apparent from the face of this statement of policy that it was not prompted by the action of plaintiff alone, but by the conduct of all of the ten. [R. 285-6.] And it is also self-evident that the cumulative effect of the spectacle of ten highly placed motion picture personalities, acting apparently in concert to defy the Congress in its investigation of Communism in the movie industry, would be much more likely to create public indignation and resentment against the industry than if just one writer had so conducted himself.

Nevertheless, whenever defendant attempted to prove the conduct of all ten of the unfriendly witnesses, the evidence was held irrelevant and immaterial, the trial court taking the position in this regard that defendant was limited to proof of what plaintiff and plaintiff alone had done. [R. 651, 721-2, 731-6, 827-8, 850-5, 622-3, 715-16.] That evidence was admissible for at least two reasons.

First: Plaintiff opened the door by proving the adoption of a policy based on the alleged conduct of these ten men. Certainly, then, the defendant should have been permitted to show what the conduct was and to what extent plaintiff was a part of it. Without such evidence the presentation to the jury was one-sided. There was before them only the statement of policy. There was no evidence, however, which the jury was entitled to consider, as to the existence in fact of the reasons which prompted its adoption.[42] Admissibility of this evidence would seem to be established by Section 1854 of the *California Code of Civil Procedure,* which is to the effect that when "part of an act . . . is given in evidence by one party, the whole on the same subject may be inquired into by the other; . . . and when a detached act . . . is given in evidence, any other act . . . which is neces-

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[42]The testimony as to the discussions which took place over the adoption of this policy was limited to proof of the fact of discussion and the jury was specifically admonished that it did not prove the facts recited. [R. 385-6, 792-3.]

sary to make it understood, may also be given in evidence." [See, also, *Hinton v. Welch,* 179 Cal. 463, 465-6, 177 Pac. 282, 283; *Reeves v. Vallow,* 16 Cal. 2d 95, 99-100, 104 P. 2d 1017, 1020. Compare, *Liberty Bank v. Ernst,* 93 Cal. App. 560, 563, 269 Pac. 959, 960; *Miller v. Magill,* 130 Cal. App. 414, 418, 20 P. 2d 58, 59.]

Second: There was evidence below of such concert of action among the unfriendly witnesses as would have justified an inference that they acted as they did in pursuance of an agreed plan or confederation. [*Statement of the Case,* B, 2, *supra,* pp. 20-21.] In fact there was evidence of an express admission by plaintiff that just such an agreement had been made. [R. 362.] The legal effect of that kind of an agreement is to make each one of the confederates responsible for the acts of the others in furtherance of the common design. [*Dodge v. Meyer,* 61 Cal. 405, 421-2; *Mox Incorporated v. Woods,* 202 Cal. 675, 677-8, 262 Pac. 302, 303; *Revert v. Hesse,* 184 Cal. 295, 301-3, 193 Pac. 943, 946.] The proffered evidence was, therefore, admissible to show the conduct with which plaintiff was chargeable fully as much as his own.

B. Evidence of the Actual State of Public Opinion With Respect to Communism Generally and the Conduct of Plaintiff Specifically Should Have Been Admitted as Bearing Directly on the Issue of the Tendency of That Conduct to Excite Public Scorn and Contempt. [Specification of Error, Nos. 2, 3.]

Defendant sought in three different ways, but was not permitted, to introduce evidence of the actual state of public opinion with respect to Communism and plaintiff's conduct. First, by Mr. Max Eastman, a witness who was admittedly qualified as a student and analyst of Marxism and Communism, who had traveled throughout the United States for several years lecturing on the subject and who was, therefore, in a position to testify to his observations of the public's attitude, it was offered to prove the public feeling in this country toward the Communist Party. [R. 829-44.] Defendant also offered, as some evidence of public reaction to plaintiff's conduct, and as the source of or inspiration for the attitude of their readers, a collection of several hundred editorials which appeared in newspapers throughout the country.[43] [R.

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[43]The editorials so offered were marked for identification only and are part of the record on appeal, but because of their bulk were not designated for printing. Typical examples of the mass are printed in the appendix to this brief. For present purposes, it will serve to say that the editorials appeared in newspapers in every section of the United States; that they commented on the Committee hearings generally and on the conduct of the unfriendly witnesses; and that while opinion was divided as to the hearing itself and certain of its procedural features, they were almost unanimous in their condemnation of the Communist Party and of the conduct of the witnesses who refused to say whether they were members of the Communist Party. In this latter connection, many of the editorial writers drew the inference, from such refusal, that the men were in fact Communists, and stated that their conduct was an insult to the public, that it was contemptuous in fact as well as law, that it raised doubts as to their loyalty, and the like.

C. **Defendant Should Have Been Permitted to Prove the Illegality of the Communist Party Because of Its Advocacy of Force and Violence, Especially as the Jury Was Instructed That Its Legal Status Should Be Considered in Determining the Effect of Plaintiff's Conduct.** [Specification of Error, No. 4.]

Defendant offered to prove, by a witness whose competency was not questioned, that the Communist Party of America advocates the overthrow of our form of government by force and violence and is an agent of a foreign power. The proof was not allowed to be made. [R. 829-44.] We have already pointed out that this evidence would have established the unlawful character of the party and of knowing membership in it; and that in the absence of such testimony the trial court was enabled to tell the jury, in effect, that membership was not a crime in California, which fact was to be considered by them in determining whether plaintiff's conduct had the consequences claimed for it by defendant. [Point I, B, *supra,* pp. 74-77.] The argument and cases there referred to, we submit, demonstrate the error of the ruling excluding defendant's evidence, as well as in the charge which was the immediate subject of the previous discussion. We add a brief word on another aspect of the question of admissibility.

It takes no great student of "the usual propensities or passions of men . . ." to draw the inference that membership in an organization of the sort which defendant sought to prove the Communist Party was and

is, and whose leaders are even now publicly committed not to support this country in the event of war with Russia, would be looked upon by the great mass of loyal Americans with at least scorn and contempt. The evidence, therefore, bore directly on the issue of public attitude which lay at the bottom of this case. It was admissible under the California rule that any evidence of a fact which has "a reasonable tendency to facilitate a fair conclusion on a controverted issue . . . ." is material. [*Miller v. Magill, supra,* 130 Cal. App. at 418, 20 P. 2d at 59; *Ellis v. Woodburn,* 89 Cal. 129, 132, 26 Pac. 963; *Kurokawa v. Saroyan,* 95 Cal. App. 772, 777-8, 273 Pac. 613, 615; *Coffee v. Williams,* 103 Cal. 550, 558, 37 Pac. 504, 507. The Federal rule is the same: *Home Ins. Co. v. Weide,* 78 U. S. 438, 440, 20 L. Ed. 197, 198.]

D. Defendant's Cross-Examination of Plaintiff Was Unduly Limited When Inquiry if Plaintiff's Real Reason for His Conduct Was a Desire to Avoid Revelation of Communist Party Membership Was Not Permitted. [Specification of Error, No. 5.]

In the course of his testimony, plaintiff took the position that in refusing to answer the Committee's question as to Communist Party membership he was seeking to uphold his "rights of association" and the constitutional rights of citizens generally. [R. 483; 631; 633; 547-8.] This explanation must have been given considerable credence by the jury in view of the detailed charge on the right of witnesses so to conduct themselves. [R. 911-13.] And certainly, the giving of that charge was a clear indication that plaintiff's motive was thought by the trial court to have a material bearing on the issues of fact to be decided. It, therefore, would seem clearly to have been within the scope of legitimate cross-examination to inquire, as defendant was not permitted to do [R. 597-603; 613-17; 674-7], whether plaintiff's real reason or motive, instead of being the one expressed by him, was the somewhat less creditable one of a desire to avoid disclosing party membership. [*Cal. Code of Civil Procedure,* sec. 2048; *Estate of Flood,* 217 Cal. 763, 784-5, 21 P. 2d 579, 587; *People v. Flores,* 15 Cal. App. 2d 385, 401, 59 P. 2d 517, 526; *Jackson v. Feather River Water Co.,* 14 Cal. 18, 23-4; *Heard v. U. S.* (C. C. A. 8), 255 Fed. 829, 831-2; *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.* (C. C. A. 8), 129 Fed. 668, 674.]

This line of examination was also proper in its own right, *i. e.,* as directed to a fact from which an inference as to public feeling toward plaintiff could have been drawn, much as in the case of the evidence relating to the objects of the Communist Party generally. [See, arguments and cases cited, Point II, C, *supra,* pp. 116-17.]

E. Defendant's Cross-Examination of Plaintiff Directed to Showing the Latter's Wilfulness and Intent Was Unduly Restricted. [Specification of Error, No. 6.]

On cross-examination of the plaintiff, defendant sought to inquire into plaintiff's sources of knowledge and actual knowledge of the state of public feeling toward Communism, into his awareness and consideration of that feeling and of the possible public consequences *vis-a-vis* his conduct, at the time he determined to act as he did before the Committee. This line of inquiry was shut off by the trial court. [R. 590-619.]

It seems plain to us, however, that this too was a legitimate field of cross-examination. [Cases cited, Point II, D, *supra,* p. 118.] Defendant assuredly was entitled to show that plaintiff had acted wilfully and with a realization of the possible reaction to his conduct. The trial judge thought plaintiff's wilfulness and intent were important elements of the case, for he instructed the jury on those subjects and imposed upon defendant the burden of proving their existence by a preponderance of the evidence. [R. 904. See, also 601-2.] If they were subjects worthy of mention in the charge, they were emphatically proper matters upon which to address some questions to the person whose wilfulness and intent were in issue.

F. **Evidence of Payment of Salary and Continued Exhibition of Motion Pictures for Which Plaintiff Had Written the Screenplay Was Irrelevant and Not Within the Issues.** [Specification of Error, No. 7.]

Over defendant's objection specifically grounded on the claim that the evidence was irrelevant and went beyond the issues, the trial court permitted plaintiff to prove that his salary had been paid by defendant after the Committee hearing and to the date of suspension; and that also subsequent to the hearing, defendant had continued to distribute various motion pictures on which plaintiff had worked. In the latter connection, the evidence included details as to the number of bookings. [R. 694-6; 863-7. See note 11, *supra,* p. 24.]

There was, of course, other evidence now relied upon to support the claim of waiver or condonation [*Statement of the Case,* B, 4, b, c, d, *supra,* pp. 24-31]; but that evidence was offered and received on other issues. The absence of objection to this last mentioned evidence did not have the effect of injecting the unpleaded issue of waiver into the case. [*Riverside Water Co. v. Gage,* 108 Cal. 240, 245, 41 Pac. 299, 300; *Crescent Lumber Co. v. Larson,* 166 Cal. 168, 171, 135 Pac. 502, 503; *Baar v. Smith,* 201 Cal. 87, 99-100, 255 Pac. 827, 832.]

The evidence to which objection was made was erroneously admitted, because it related to a matter outside the pleadings and the issues as settled by the pretrial order. [Cases cited, Point I, C, *supra,* pp. 78-79;

County of Macon v. Shores, 97 U. S. 272, 277, 24 L. Ed. 889.]

Inadmissibility of the evidence relating to distribution was further established by the fact that such distribution was in no wise inconsistent with suspension or termination of the employment contract and was, therefore, no evidence of waiver. [See, *Medico-Dental etc. Co. v. Horton & Converse,* 21 Cal. 2d 411, 432, 132 P. 2d 457, 469. Generally, see 67 C. J. 304, sec. 7.] Under the employment contract defendant became the absolute and unconditional owner of the products of plaintiff's services; had the unrestricted right to use those products in its pictures; was, of course, the owner of the pictures and had the complete right to distribute and disseminate them. These rights survived any termination or suspension of the contract, so that exercise of them was obviously not inconsistent with the position that plaintiff's employment was suspended or his contract terminated. [R. 9-11.]

III.

THE CAUSE SHOULD HAVE BEEN TRANSFERRED TO ANOTHER JUDGE BECAUSE OF THE TRIAL JUDGE'S PERSONAL BIAS AND PREJUDICE CONSISTING OF THE EXTRA-JUDICIAL EXPRESSION OF AN OPINION ON THE MERITS OF THE CONTROVERSY ADVERSE TO DEFENDANT AND BASED ON INFORMATION OBTAINED OTHERWISE THAN IN THE COURSE OF THE PROCEEDINGS. [Specification of Error, No. 15.]

Pursuant to Title 28, U. S. Code, sec. 144 [formerly Judicial Code, sec. 21, 28 U. S. C. A., sec. 25], defendant filed a verified application to transfer the cause from the District Judge to whom it had been assigned, on the ground of personal bias and prejudice based on matters which are set out in the Statement of the Case, *supra,* p. 38.

The affidavit on which this application was based recited in detail the source of the affiant's information; the dates on and circumstances under which it obtained that information; made the general averment of its belief that the District Judge had a personal bias and prejudice against defendant and in favor of plaintiff in respect of the pending cause; gave the facts and reasons upon which that belief was based; and bore the appropriate certificate of counsel of record. [R. 43-6.] It was, therefore, formally sufficient. [*Berger v. U. S.,* 255 U. S. 22, 32-6, 65 L. Ed. 481, 485-7, 41 S. Ct. 230, 233-4; *Nations v. U. S.* (C. C. A. 10), 14 F. 2d 507, 509-10, *cert. den.* 273 U. S. 735.] Under the Federal practice the District Judge was required to accept the facts averred as true. His only function was to pass upon their legal sufficiency.

If found sufficient his recusation became imperative and he was without power thereafter to act in the cause.[44] [*Berger v. U S., supra; Nations v. U. S., supra; Mitchell v. U. S.* (C. C. A. 10), 126 F. 2d 550, 552, *cert. den.* 316 U. S. 702, *rehear. den.* 324 U. S. 887; *Lewis v. U. S.* (C. C. A. 8), 14 F. 2d 369, 371; *Schmidt v. U. S.* (C. C. A. 6), 115 F. 2d 394, 397; *Morris v. U. S.* (C. C. A. 8), 26 F. 2d 444, 449.] The District Judge, however, held the affidavit insufficient and continued to preside in the cause until its final disposition in the trial court. [R. 47-76; 77; 168-9.] In so ruling and acting there was, we respectfully submit, error requiring a reversal of the judgment appealed from.

The personal bias or prejudice which disqualifies a Federal judge is shown by facts which "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment . . ." [*Berger v. U. S., supra,* 255 U. S. at 33-4, 65 L. Ed. at 485, 41 S. Ct. at 233. See also, *Mitchell v. U. S., supra,* 126 F. 2d at 552; *State v. Himes,* 144 Fla. 145, 147-8, 197 So. 762, 763; *Wiedemann v. Weidemann* (Minn. 1949), 36 N. W. 2d 810, 812.] Such facts may, and usually do, consist of the formation and expression of an extra-judicial opinion upon the merits of the cause, based upon sources of information other than the evidence and proceedings in the case. [*Berger v. U. S., supra; Nations v. U. S., supra,* 14 F. 2d at 509-10; *McFadden v. U. S.* (C. C. A. 7), 63 F. 2d 111, 112; *Moskun v. U. S.* (C. C. A. 6), 143 F. 2d 129, 130; *Whitaker v. McLean* (C. A.,

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[44]At appellee's request counter-affidavits filed by the District Judge have been printed in the record. These affidavits, however, cannot be considered for any purpose. [Cases cited in the text, above.]

D. Col.), 118 F. 2d 596; *Schmidt v. U. S., supra,* 115 F. 2d at 397; *Lewis v. U. S., supra,* 14 F. 2d at 371.][45]

Exactly that "bent of mind" derived from precisely such extra-judicial sources is established by the instant affidavit. In this connection it should be noted that the case at bar was commenced in the State court on January 7, 1948, ordered removed to the District Court on February 2, 1948, and the record actually filed in that court on February 25, 1948. [R. 38-9.] The District Judge's remarks were made not later than the early part of January, 1948. [R. 44.] Of necessity, then, they must have been based on extra-judicial information, since the cause had not yet been removed to the Federal court, nor had any proceedings been had or any evidence been taken in that court at the time in question. On the other hand, the purported facts of the controversy had been widely publicized [*Statement of the Case,* B, 1, *supra,* p. 19]; and the District Judge was aware of that publicization, as is shown by comments made by him at a hearing held before the affidavit was filed, and before any evidence had been taken. [R. 228-9.] The opinion expressed, plainly indicating as it did a complete pre-judgment of appellant's liability in the premises derived *non coram judice*, was in full measure the expression of a disqualifying personal bias and prejudice within the teaching of the cases cited.

The argument, which prevailed with the District Judge, that mere pre-judgment does not amount to the personal bias or prejudice aimed at by the statute is untenable when tested by those cases. True enough a pre-judgment,

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[45]The matters which brought about disqualification in the *Moskun* and *Lewis* cases do not appear in the reported opinions. Appropriate excerpts from the records in those cases appear in the appendix to this brief.

when judicially expressed and based upon proceedings and evidence in the cause, does not always bring the disqualification statute into operation;[46] nor does an impersonal attitude or opinion derived from the judge's background or experience. [*Price v. Johnston* (C. C. A. 9), 125 F. 2d 806, 811-12, *cert. den.* 316 U. S. 677, *rehear. den.* 316 U. S. 712; *Sacramento Suburban etc. Co. v. Tatham* (C. C. A. 9), 40 F. 2d 894, *cert. den.* 282 U. S. 878; *Henry v. Speer* (C. C. A. 5), 201 Fed. 869, 871-2.] But that is a far different matter from an opinion on the merits of a pending action derived *non coram judice.* The latter type of pre-judgment is the very kind of personal bias and prejudice at which the statute is directed. [*Craven v. U. S.* (C. C. A. 1), 22 F. 2d 605, 607-8, *cert. den.* 276 U. S. 627; *Ferrari v. U. S.* (C. C. A. 9), 169 F. 2d 353, 355; *Moskun v. U. S., supra,* 143 F. 2d at 130; *Schmidt v. U. S., supra,* 115 F. 2d at 397; *U. S. v. 16,000 Acres of Land* (D. C.), 49 F. S. 645, 649; *In re Beecher* (D. C.), 50 F. S. 530, 532; *Ryan v. U. S.* (C. C. A. 8), 99 F. 2d 864, 871. See, also, *Clarke v. Commonwealth,* 259 Ky. 572, 573, 82 S. W. 2d 823, 824; *People v. District Court,* 60 Colo. 1, 10, 152 Pac. 149, 154.]

General language in a few decisions to the effect that pre-judgment is not bias or prejudice must be read with this distinction in mind and with regard for the actual facts with respect to which the dictum was uttered. It will then be seen that the generalization upon which the District Judge relied appears only in cases where the

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[46]But compare, in this regard, *Moskun v. U. S., supra,* 143 F. 2d at 130; *Whitaker v. McLean, supra,* 118 F. 2d at 596.

D. Col.), 118 F. 2d 596; *Schmidt v. U. S., supra,* 115 F. 2d at 397; *Lewis v. U. S., supra,* 14 F. 2d at 371.][45]

Exactly that "bent of mind" derived from precisely such extra-judicial sources is established by the instant affidavit. In this connection it should be noted that the case at bar was commenced in the State court on January 7, 1948, ordered removed to the District Court on February 2, 1948, and the record actually filed in that court on February 25, 1948. [R. 38-9.] The District Judge's remarks were made not later than the early part of January, 1948. [R. 44.] Of necessity, then, they must have been based on extra-judicial information, since the cause had not yet been removed to the Federal court, nor had any proceedings been had or any evidence been taken in that court at the time in question. On the other hand, the purported facts of the controversy had been widely publicized [*Statement of the Case,* B, 1, *supra,* p. 19]; and the District Judge was aware of that publicization, as is shown by comments made by him at a hearing held before the affidavit was filed, and before any evidence had been taken. [R. 228-9.] The opinion expressed, plainly indicating as it did a complete pre-judgment of appellant's liability in the premises derived *non coram judice*, was in full measure the expression of a disqualifying personal bias and prejudice within the teaching of the cases cited.

The argument, which prevailed with the District Judge, that mere pre-judgment does not amount to the personal bias or prejudice aimed at by the statute is untenable when tested by those cases. True enough a pre-judgment,

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[45]The matters which brought about disqualification in the *Moskun* and *Lewis* cases do not appear in the reported opinions. Appropriate excerpts from the records in those cases appear in the appendix to this brief.

when judicially expressed and based upon proceedings and evidence in the cause, does not always bring the disqualification statute into operation;[46] nor does an impersonal attitude or opinion derived from the judge's background or experience. [*Price v. Johnston* (C. C. A. 9), 125 F. 2d 806, 811-12, *cert. den.* 316 U. S. 677, *rehear. den.* 316 U. S. 712; *Sacramento Suburban etc. Co. v. Tatham* (C. C. A. 9), 40 F. 2d 894, *cert. den.* 282 U. S. 878; *Henry v. Speer* (C. C. A. 5), 201 Fed. 869, 871-2.] But that is a far different matter from an opinion on the merits of a pending action derived *non coram judice.* The latter type of pre-judgment is the very kind of personal bias and prejudice at which the statute is directed. [*Craven v. U. S.* (C. C. A. 1), 22 F. 2d 605, 607-8, *cert. den.* 276 U. S. 627; *Ferrari v. U. S.* (C. C. A. 9), 169 F. 2d 353, 355; *Moskun v. U. S., supra,* 143 F. 2d at 130; *Schmidt v. U. S., supra,* 115 F. 2d at 397; *U. S. v. 16,000 Acres of Land* (D. C.), 49 F. S. 645, 649; *In re Beecher* (D. C.), 50 F. S. 530, 532; *Ryan v. U. S.* (C. C. A. 8), 99 F. 2d 864, 871. See, also, *Clarke v. Commonwealth,* 259 Ky. 572, 573, 82 S. W. 2d 823, 824; *People v. District Court,* 60 Colo. 1, 10, 152 Pac. 149, 154.]

General language in a few decisions to the effect that pre-judgment is not bias or prejudice must be read with this distinction in mind and with regard for the actual facts with respect to which the dictum was uttered. It will then be seen that the generalization upon which the District Judge relied appears only in cases where the

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[46]But compare, in this regard, *Moskun v. U. S., supra,* 143 F. 2d at 130; *Whitaker v. McLean, supra,* 118 F. 2d at 596.

recused judge's allegedly disqualifying opinion was rendered in the very cause in which his disqualification was sought or in a connected case and was based on judicial proceedings had before him.

The decision from which this dictum seems to stem is *Henry v. Speer, supra,* 201 Fed. at 871-2. The facts there involved are more fully stated in the District Court's opinion on the same matter, found in *Henry v. Harris* (D. C.), 191 Fed. 868. It will be seen from the latter report that the pre-judgment complained of was a judicial opinion based on knowledge obtained from proceedings in the cause. The distinction to which we have adverted was there made, as may be seen from the syllabus, prepared by the court, in which the rule is said to be that "It is not sufficient to disqualify a judge . . . to allege that he has formed an opinion as to the law of the case and the rights of the parties, when it has been *judicially formed* and published for legitimate purposes . . ." [Italics ours.]

This distinction has been recognized in the Ninth Circuit. In *Ferrari v. U. S., supra,* 169 F. 2d at 355, this court, citing *Craven v. U. S., supra,* 22 F. 2d at 607-8, said that "personal bias . . . has been held to be an attitude of *extra-judicial origin* . . ." and therefore, could not be held to have been shown by a "*Judicial* opinion formed *on evidence* in a hearing against others . . ." [Italics ours.] If effect is given to this difference in the case at bar, the statutorily compelled disqualification of the trial judge is fully established in the record.

CONCLUSION.

Each one of the errors which we have discussed was substantial and materially affected an important part of the defendant's case. Both singly and in cumulative effect the serious and prejudicial consequences of the trial court's rulings were such as to have prevented a full and fair presentation of the defendant's case. The judgment, therefore, should be reversed with a direction to the trial court that any further proceedings in the cause should be had before another district judge.

Respectfully submitted,

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